

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

959

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,123

CHRISTIAN FUNDAMENTAL CHURCH,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

LORENZO W. MILAM & JEREMY D.
LANSMAN, A Partnership,

Intervenors.

On Appeal from Orders of the
Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 25 1968

W. J. [unclear]

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JOINT APPENDIX

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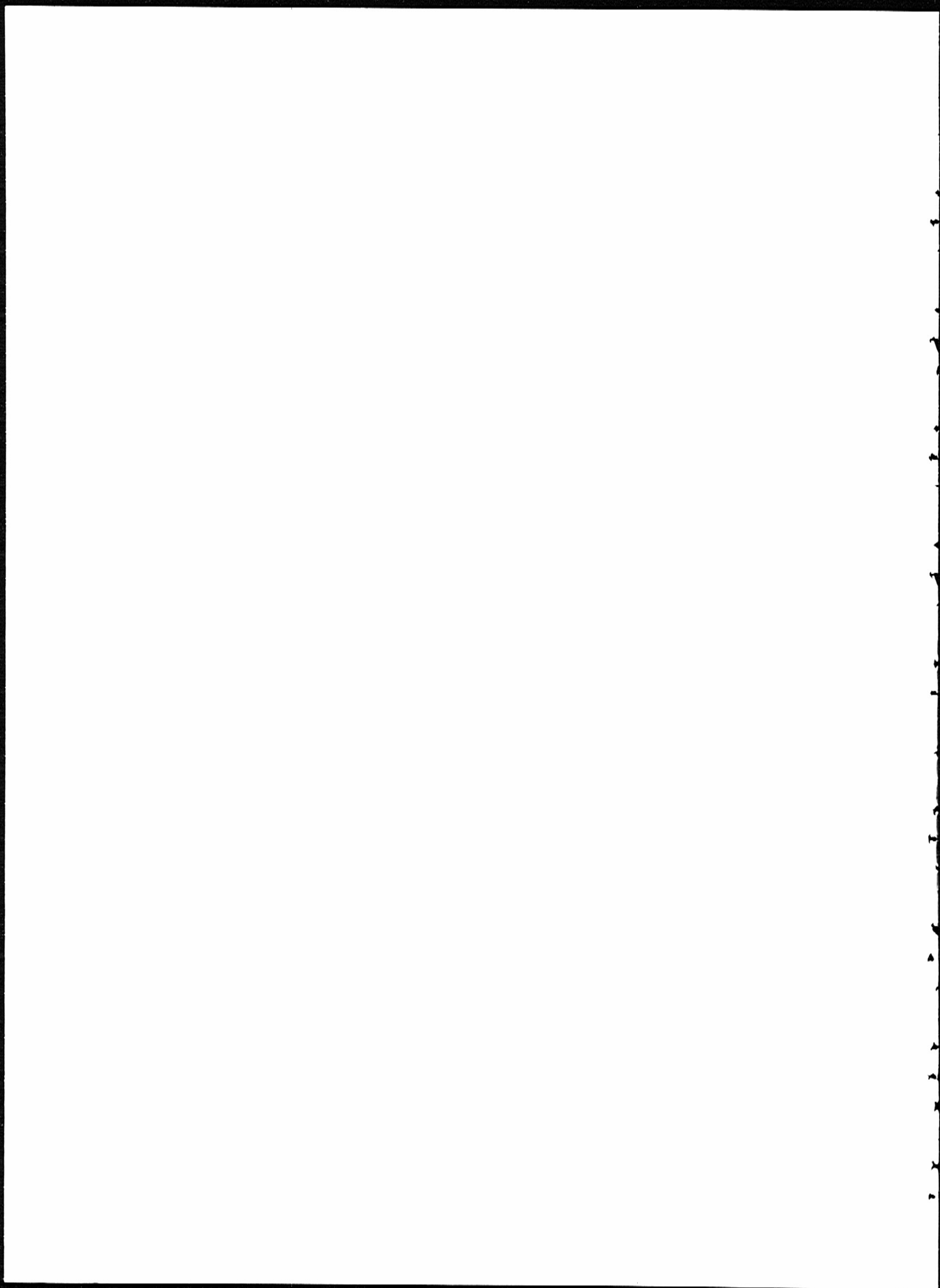
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JOINT APPENDIX

[Rec'd-Aug. 8, 1967]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTIAN FUNDAMENTAL CHURCH)

Appellant)

v.)

FEDERAL COMMUNICATIONS)
COMMISSION)

Appellee)

CASE NO. 21,123

PREHEARING STIPULATION

Counsel for the respective parties to the above-entitled appeal hereby stipulate as follows:

- I. The issues presented by this appeal are as follows: ^{1/}
1. Whether in resolving the site availability issue the Commission committed reversible error by:
 - a. overruling appellant's objection to the admissibility of certain evidence;
 - b. restricting appellant's inquiry into matters pertaining to the site availability issue;
 - c. concluding that intervenor had met its burden of proof.
 2. Whether in resolving the comparative issue the Commission failed to:
 - a. consider and properly weigh the record evidence;

^{1/} Appellee and Intervenor do not necessarily agree with any factual or legal premise implicit in these issues.

b. act in accord with the Commission's established guidelines applicable in comparative proceedings;

c. follow its decisions in other comparative proceedings decided at approximately the same point in time.

3. Whether the Commission in view of all of the evidence, should have concluded that a grant of appellant's application and not Intervenor's application, would better serve the public interest, convenience, and necessity.

II. The joint appendix shall be filed within 10 days after the filing of the Appellant's reply brief, or, if the Appellant does not file a reply brief, then within 25 days after the filing of the briefs of Appellee and Milam-Lansman, Intervenor.

III. In preparing briefs, the parties shall, when referring to record material, indicate the page or pages in the original record where such material may be found. The pages of the joint appendix shall be consecutively numbered and shall, in addition, bear appropriate record page numbers so that the reference to the record material printed in the joint appendix may readily be found.

Respectfully submitted,

/s/ Leonard S. Joyce
Counsel for Appellant
Christian Fundamental Church

/s/ Joseph Marino
Counsel for Appellee
Federal Communications Commission

/s/ Michael H. Bader
Counsel for Intervenor
Lorenzo W. Milam and Jeremy D.
Lansman, a Partnership

[Filed Aug. 10, 1967]

Before: Burger, Acting Chief Judge,
in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

Seattle Times, Dec. 1962

Civil-Liberties Unit Here Honors Seven for Support

Seven organizations and individuals have been cited by the Seattle Chapter, American Civil Liberties Union, for their support of civil liberties.

The citations, the first of their kind, were made at the chapter's annual meeting Saturday evening.

Those cited were:

The Seattle Chapter of the Congress of Racial Equality, for efforts to promote equal employment.

The University Y. M. C. A. and Y. W. C. A., for making facilities available for a speech

by Gus Hall, national Communist leader.

Stan Stapp, publisher of The Greenwood Outlook, for an editorial on the University of Mississippi integration crisis.

Sidney Gerber, for building and finding housing for minority groups.

The Seattle Times, for its October 24 editorial recognizing the rights of peaceful pro-Cuba pickets during the Cuban crisis.

Alfred Westberg and his Citizens' Advisory Committee to the Mayor on Minority Housing.

Lorenzo Milam, for establishment of a noncommercial FM radio station over which he plans to air criticism from various political, artistic and other factions.

Dr. Arthur Flemming, president of the University of Oregon and secretary of health, education and welfare in the Eisenhower administration, told the meeting that Hall's appearance at the University of Oregon last year was permitted because of the institution's tradition of allowing anyone to speak in the interests of freedom of inquiry.

The Washington Teamster, 552 Denny Way

Seattle 9, Wash.

Dear Sirs:

Station KRAB has gone on the air at 5 p.m. on December 12. We broadcast daily from 5 p.m. to 11 p.m., and besides our irregular forums, discussions, folk, ethnic, classical and jazz music programs, we present a regular bi-weekly series of commentaries. These commentaries, presented Monday through Friday, at 7:30 p.m., give a regular group of individuals — representing all political opinions — a chance to speak out without the normal limitations of fear of controversy, or of time-restrictions-between-advertisements (since KRAB is non-commercial, there will be no sort of this interruption).

Our first week (and alternating each week thereafter) lists the following commentators:

Monday: Stuart Oles

Tuesday: Deb Das

Wednesday: Giovanni Costigan

Thursday: William Hanson

Friday: Jonathan Fine

Our second week (and other alternating week thereafter) has not been fully scheduled yet, but the following persons will participate: Robert von Dassow, Father Costello, Father O'Brien,

Frank Kramowsky, and one yet to be named.

We feel these commentaries, and our regular discussions, present an interesting test of the concept of free speech. We would appreciate any coverage, interest, or advice that you can offer us.

Sincerely,
Lorenzo W. Milam,

Broadcasting Magazine
December 1962

Media reports...

On-the-air • KRAB (FM) Seattle, Wash., a non-commercial station specializing in off-beat programming, began broadcasting Dec. 13 on 107.7 mc with 20 kw. The new fm outlet, which depends on its listeners for support, features such programs as poetry, drama, folk, ethnic, and jazz music, and political commentary representing all sides. KRAB has six subscribers thus far. Station is owned by Lorenzo W. Milam.



Broadcasting On a Shoestring

Nov. 1962

By C. J. SKREEN

One of the more novel broadcasting experiments began operation here Thursday, when KRAB-FM took the air on 107.7 megacycles.

The new frequency-modulation outlet is unusual on several counts: The station was built and is manned by volunteer help; it will specialize in offbeat programming not otherwise available, and the entire operation will be strictly noncommercial. Listeners, in short, will be spared the blessing of a few thousand well-chosen words from the sponsor after every selection.

Whether the 20-kilowatt station makes it without advertising revenue will be up to listeners. Those who appreciate its programming will be asked for contributions to sustain the operation.

THE STATION IS ON the air from 5 o'clock in the afternoon until 11 at night and expects to offer daytime programming beginning next month. The transmitter and studios are in an old doughnut shop at 8029 Roosevelt Way.

Lorenzo W. Milam, a former announcer with KPFA, a noncommercial outlet operated by the Pacific Foundation in Berkeley, Calif., is the sparkplug behind the venture. His volunteer staff includes Robert Garlas as music director, Gary Margason as program director and Jeremy Lansman in charge of poetry and drama.

Milam reports the station's purpose is to present as many viewpoints as possible on the air. "We have eight volunteer commentators now," he said, "and we will bank heavily on forums and interviews, with opinion ranging from the far left to the far right. We intend to KRAB about a lot of things."

MOST OF THESE PROGRAMS will pursue an "open-end" pattern, running an hour, two hours or more. "Time is unimportant to us," Milam said. "Our round-table discussions will continue to their natural conclusion as the issues warrant."

Other programming features will be classical music not ordinarily heard on other stations; readings from the classics; drama, and general commentary. This will include such way-out fare as Chinese operas and readings from Cicero in Latin with a jazz background.

Some pessimists may argue there is no compelling demand for Cicero in Latin—with or without jazz accompaniment—but Milam and his volunteers rate a 21-gun salute for having the courage to try something different.

NEW YORK TIMES, SATURDAY, JULY 13, 1963.

LATIN PROGRAMS ENDED IN SEATTLE

45 Other Languages Still Thrive Over U.S. Stations

By RICHARD F. SHEPARD
Latin, sometimes called a dead language, has died again. A Seattle radio station, after briefly broadcasting a weekly half hour in classical Latin, has had to revert to all-English programming.

The station, KRAB-FM, is a small subscriber-supported enterprise founded less than a year ago. In addition to carrying the Latin program—a unique feature, according to the 1963 yearbook of Broadcasting magazine—KRAB-FM also broadcast 30 minutes in classical Greek. But a station spokesman said yesterday, the two fluent gentlemen who had volunteered to do the programs were unable to continue. And summer replacements in classical Latin and Greek are hard to find.

A Week's Miscellany

EXECUT: Latin, as a language, has died another death. KRAB-FM, a small Seattle radio station, has been broadcasting weekly half-hour programs in Latin and classical Greek, but last week had to revert to all-English programming. The volunteer announcers were unable to continue, and the station, with "small skill in Latin, and still less in Greek," was unable to find summer replacements.

• Lorenzo Milam, who is running KRAB-FM (107.7 MC) on a thin dime and with loyal but scattered support from those who cherish free speech and varied music on the air. His mimeo releases provide some of the finest understatement of Seattle's literary life: "... we could use two chairs for our discussion programs; some participants seem to resent sitting on the floor."

New York Times

July, 1963

Seattle Argus
April 19, 1963

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from the original

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Attachment B

EXCERPTS OF AN ARTICLE PUBLISHED IN
PUGET SOUNDINGS, THE MAGAZINE OF THE
JUNIOR LEAGUE OF SEATTLE, FOR APRIL,
1964

"KRAB: THE ULTIMATE IN MINORITY LISTENING"
by Lorenzo W. Milam

. . . When Bradley wrote about the tragedies of Shakespeare, he felt that the tragic force lay in the enormous waste: that some man-king-noble such as Hamlet or Lear would have to be destroyed in order to set the universe right again. It is only somewhat less tragic that the communication media in this country should be such a waste — an extraordinarily complex and fine method of reaching a mass audience dedicated to the principle only of entertainment, only of diversion.

Think of it: in the whole of the United States, there are some 700 television stations, some 5000 broadcast stations. Marvelously complex apparti, all those kilowatts, those gleaming facilities: gushing out Ozzie and Harriet or What's My Line or The Beverly Hillbillies. Think of all the enormous effort. It is as if God went to all the trouble to create the earth — with its seas and forests and deserts — and then peopled it with worms. Television with its plethora of talented camera men, and directors, and writers — working enormously so that we can see Jackie Gleason take a prat-fall on the stage.

And radio: we have a friend whose hobby is DX-ing. That means sitting on the floor all night in front of the radio — and when the proper benediction are said to the great ether-god — he hears broadcast stations from all over the country . . . WWL in New Orleans, WCKY in Cincinnati, WSB in Atlanta, WABC in New York. He delights in the voice traveling three thousand miles to be delivered into his radio, into his ear.

We are more critical: we listen not for distance but for content. And we hear the same in every city. The Beatles in Boston and Seattle,

Arthur Godfrey in New York and Yakima, the Signing Nun in Philadelphia and Everett, Fabian in Charlotte and Chicago and Denver and Tacoma. We know there is so much special going on in each of these cities — and we wonder why we are not allowed to hear the thousand voices of a thousand cities — sociologists from Chicago, blues singers from Atlanta, jazz musicians from New York, political cranks from Washington, poets from San Francisco, contemporary musicians from Boston.

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There is a price for the sameness that litters our radio dial — it is the loss of potentiality, the waste when an unusual idea, or a rare poem, or a strange piece of music is not communicated. It is the waste of saying the finances of the broadcast station owner are more important than the communication of the richness of ideas the human mind is capable of producing . . .

In the year and a half we have been on the air, we have broadcast some 500 commentaries, encompassing every possible political point of view — The John Birch Society, the Socialist Worker's Party, the Young Republicans, the Catholics, the Atheistic, the Peace Groups, and all the enormous range of inbetweeners who have no other place to go, no other means to be heard. KRAB is a gigantic soap-box, lodged up there at the corner of the dial, open to anyone so long as his opinion is backed by some sort of logic, so long as what he says won't get us put in the pokey. In the year and a half we have been on the air, we have broadcast about seventy-five panel discussions — on any conceivable subject: Liquor Laws, Civil Defense, Open Housing, Capital Punishment, Contemporary Poetry, Contemporary Music, the U. S. Policy towards Red China, the Common Market, Civil Rights — all set up with one plan in mind: that the panel participants be of the widest possible divergency of viewpoints in order that they might disagree, and in their public disagreement, give enough facts so that the listener can begin to make up his own mind. In

the year and a half we have been on the air, we have interviewed the most diverse group of speakers: ex-Senators, Anarchists, musicians, governmental representatives, pacifists, dissidents of every shape and hue — all set up with one plan in mind: that the interviewer be sufficiently knowing and disagreeable that the framework of logic upon which the visitor sets his political or social framework be totally exposed.

Argument, disagreement, dissent: this is the trade-mark of KRAB; we are one big grump. Divergent views can be so exciting, so meaningful: and to have an educated populace, the most wide range of viewpoints must be exposed. We can hide from nothing. We must expose ourselves to dissent . . .

* * * *

Affiant swears that this is a true and exact reproduction of excerpts of an article written by him for the magazine Puget Soundings, published in April of 1964.

/s/ Lorenzo W. Milam
Lorenzo W. Milam

Signed and sworn to this 10 day of November, 1964.

(Seal)

/s/ Dorothy J. Buchanan
Notary Public

My Commission expires June 29, 1968.

Milam and Lansman
FCC Docket No. 15615
Exhibit 2

BIOGRAPHY OF JEREMY D. LANSMAN

My name is Jeremy David Lansman. I was born in Los Angeles, California, on November 25, 1942. I am a partner of Milam and Lansman, an applicant for an FM station in St. Louis, Missouri. I am temporarily residing at 640 East Capital Street, Washington, D.C., where I am staying while I am working on the hearing of proceedings.

BIOGRAPHY

I developed a very early interest in electronics, science, and in particular, radio. I believe it was during a stay in a hospital, at the age of seven, that I first displayed a special interest in electronics. I remember having been given a breadboard, upon which had been placed several lights, several knife switches, a rheostat, a telegraph key, and a buzzer. This was all powered by a bell transformer. The board was supplied with a myriad of little wires, at each end of which there was an alligator clip. The person who gave this to me remembers my spending hours with the toy, arranging the connections in different ways, and making the parts of the board do different things.

Later on, probably around the age of eight or nine or so, I spent much of my time working with an old Model T spark coil. This is the only automobile ignition coil with its own vibrator, and it is useful for producing about 10,000 harmless volts. I remember particularly, experimenting with the Hertzian waves which could be generated by the device, and seeing if I could blank out television reception in our living room from the far side of the house.

I constructed two "do-it-yourself" crystal set kits. It was at about the age of 11 when I built my first tube radio. It was a three-tube, regenerative device, in kit form. It came supplied with a set of coils

for bringing in both medium and short waves. Soon, thereafter, I made a coil which brought in FM stations, and then experimented with the property of these little sets to radiate signals when they broke into oscillation. I practiced code with a friend, radiating signals across the house and next door, where we could pretend we were actually miles apart.

As time went on, my interest drew me into constructing, or trying to construct such items as a Tesla coil, a voice transmission system using

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light, an oscilloscope, a hi-fi system and amplifier, a carrier current transmission system, a miniature FM transmitter, and so on.

In 1958, I tuned into the State Police frequency around 43 Megacycles, and found somebody speaking German in much better fidelity than the customary police sound. A little tune down on the dial of an old band FM receiver brought in music! This was around 42-1/2 Megacycles, and there was no reason for music being there, especially in AM. I soon discovered that at various times of the day, television signals were available from France, Britain and Germany on channel one, for which no American receiver was equipped. So I got out an old television set, converted it to the British 455 line system, and actually brought in a picture.

All this activity ended when my mother separated from my father, and I moved to San Francisco. Within a few weeks I had joined KPFA Radio, the cultural listener-supported station, as a volunteer engineer and announcer. On a visit to Los Angeles, I had heard KPFK, Los Angeles, during its first few months on the air and was quite taken with the idea. So, upon arrival in San Francisco I wasted no time in giving some aid to a broadcast operation which I thought was deserving of help, at the same time, involving myself more deeply in a hobby I loved.

About the time I first developed my interest in electronics, I was somehow demoted from grade 4a (first semester of the fourth grade) to

Milam and Lansman
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About the time I first developed my interest in electronics, I was somehow demoted from grade 4a (first semester of the fourth grade) to

grade 3a. Although I later managed to make this up, I never really recovered, and had trouble with formal education from then on. When I moved to San Francisco, I started going to high school there. But, in the middle of my third year my mother decided I could learn more on my own. So I discontinued my formal education.

I looked for a job in radio. I acquired my first-class radio-telephone license in San Francisco. I soon found a job with Bay FM Broadcasters. I was to announce the time, and play recorded music and spot announcements on KBCO (FM), plus feed tapes into automated KBAY (FM). I was KBCO's only first-class licensee.

This job of keeping logs, playing the specific cut off of records supplied on a list that was never changed and threading tapes into the blinking automation machine, made me feel as though I was little more than an automaton myself. In my opinion, there was very little need for either of the two broadcast services which I had become a part of. This feeling was supported by lack of audience responses, and lack of money flow into either station. I felt that creative broadcasting was to be preferred to the low quality, poorly programmed services for which I was working.

And so when the opportunity developed for a job which would give me true responsibility, on a station that was actually doing more than presenting canned music with pre-taped announcements, I jumped at the opportunity.

In 1961, I found myself chief engineer of station KHOE at Truckee, California. I also had a five-hour nightly board shift. Among other things, I initiated a revamping of the station's technical facilities to improve the audio quality, ease of operation and general appearance. This required a new control room and many hours of work daily. Also, partially at my insistence the station instituted a "rock and roll" program that started at 8:30 p.m. each evening. Apparently, this was the only

type of programming the majority of our nighttime audience wanted, as shown by a survey I took on the air and with the telephone several nights in a row. I was completely responsible for the new program, and I think I devised several unusual "rock and roll" formats which I used at various periods during the time I ran the program.

Unfortunately, KHOE was a class IV, 250 watt, nighttime station in the Sierra Nevada Mountains. I think that at most times the audience reached with our meager nighttime coverage could have all come into the studio to listen to our records and talk. We could have dispensed with the transmitter. Nevertheless, I found this station to be an excellent training ground.

I was soon sent by the owner of KHOE to Honolulu, Hawaii, where I was responsible for the construction of station KHAI (AM). I arrived in Honolulu at the age of 18, alone and on my own to initiate the construction of this station. I then was astounded that I, an 18 year old, was given this responsibility. To be frank, I was not certain I could handle the problems of building this 5 Kilowatt station, which was to diplex with the KORL (AM) tower, a station already existing. During the first few weeks I made arrangements to commence remodeling the studio site, and to receive the many crates of new equipment. Soon, my assistant technician, Barry Cunningham, arrived to help me in the technical work, followed by Robert Sherman, the station owner, about two weeks later. As it turned out, I had no particular problems constructing this station. And I think that some of the innovations in the studio equipment made the Honolulu station the easiest to operate in the city. Audio quality of the station was well within FCC requirements, and was as good as the best of the Honolulu stations.

The particular construction which made operation in this studio easy was a small plastic panel containing switches which performed almost all the control board work necessary at an AM station using a

limiter. Operation could be effected with only one hand, and switch functions were arranged for minimum of motion. Equipment was arranged so that it was easily accessible by a seated control board operator.

Having had difficulties with the owner, I left for the mainland. Interestingly, when I left his employ after about a year's service with him, I was the person longest employed.

I travelled for a short time, and eventually met with Lorenzo W. Milam, who was just about to face the problems of constructing a new FM broadcast station in Seattle. We found that our ideals in broadcasting were mutually compatible, and learned of each other's participation in the KPFA Berkeley broadcasting project. While in Seattle, I was again fully responsible for engineering, but had additional work in program production, and all other phases of operation of the station, from program production to floor sweeping. I think that my experiences in assembling programs, musical discussion and interviews have been invaluable.

I shall reside in St. Louis and operate the proposed FM station. This will be my sole business activity and it will consume my full time.

I have prepared this and Exhibits 3 through 9 in consultation with Lorenzo W. Milam.

/s/ Jeremy D. Lansman
Jeremy D. Lansman

Subscribed and sworn to before me this twelfth day of November 1964.

[SEAL]

/s/ Ethna White
Notary Public in and for the
District of Columbia

My Commission expires February 28, 1966.

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[EXCERPTS]

CHRISTIAN FUNDAMENTAL CHURCHExhibit 3

The Christian Fundamental Church received its Pro Forma Decree of Incorporation from the State of Missouri, as a nonstock, non-profit, religious, educational, benevolent, and scientific organization on May 3, 1946. Rev. Joseph L. Autenrieth was chosen to serve as its first president, a position to which he has been re-elected each succeeding year. Reverends Eugene L. Maxey and H. Ralph Hebblethwaite are Vice President and Secretary-Treasurer, respectively. The three constitute all the officers and directors of the corporation.

The Church is Evangelical in doctrine, is a member of the National Association of Evangelicals, and has its physical location at the corners of Compton and Lafayette, St. Louis, Missouri.

In September, 1952, the corporation opened its first private school, with eight students in the kindergarten. A grade has been added each succeeding year to date, and, at this time, there are over 250 students enrolled in all the grades, Kindergarten through Grade 12. The school curriculum is primarily college preparatory and secretarial. The school also conducts adult evening classes in the high school and collegiate level, the latter in cooperation with the Extension Department of the University of Missouri which supplies texts for use by the school. This program enables many people in the area to begin or continue their high school or college education. Particular attention is given to making up

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deficiencies for those who have not graduated from high school.

Boy Scouting, Girl Scouting, musical training and many other activities designed to give the youth something worthwhile and pleasant to do are a part of the regular programming of the church and the school.

The proposed radio station will not be either a part of the Church or School, although it is proposed that the Church and the School will produce and assist in the production of certain programs.

* * * * *

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The purpose of the program will be to enlighten the listening audience on developments in such fields as education, social work, urban renewal, juvenile delinquency, etc.

It should be pointed out that the proposed programming schedule submitted with the application and described, above, is for a typical week, and, therefore, does not include programs which will be carried on an irregular basis. For example, the station proposes to carry such important events as local and national election returns and political talks or debates of local or national interest. Also, it is proposed to carry some local high school basketball games, on a seasonable basis.

In addition to its proposed programs, the station will serve its community's needs by the broadcast of noncommercial spot announcements, promoting drives such as the Heart Fund, United Givers Fund, the March of Dimes, the Red Cross, and other local and national campaigns on behalf of civic, social, religious and charitable organizations.

PROPOSED STAFF

The staff which Christian Fundamental Church proposes for its FM station at St. Louis, Missouri, is as follows:

General Manager:	Joseph L. Autenrieth
Station Manager:	L. Eugene Maxey
Program Director:	H. Ralph Hebblethwaite

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Announcer (and Asst. General Manager)	Selected, but not named in order to protect present employment.
Salesman:	To be chosen
Two Part-time Announcers:	To be chosen

Two Engineers:	To be chosen
Receptionist:	Mrs. Maxine Autenrieth

As General Manager, it shall be the responsibility of Reverend Autenrieth to set the overall programming policies of the station, to supervise the station's operation, to co-ordinate sales efforts, to budget funds for the station, approve or disapprove purchases of a major nature, determine rate structures, establish compensation for employees, and otherwise to establish policies for the overall operation of the station.

Reverend L. Eugene Maxey, as Station Manager, will be directly responsible to Reverend Autenrieth, and will co-ordinate the functioning of the various departments of the station.

Reverend H. Ralph Hebblethwaite, as Program Director, will be responsible for scheduling shifts for announcers, implementing programming schedules, determining sequence of musical selection and otherwise supervising the programming of the station.

Christian Fundamental Church has sought out and has received a commitment of employment from an experienced broadcaster, and presently the News Director of a station in a midwestern city. * * *

* * * * *

[420]

[Released: January 18, 1965]

B
FCC 65R-20
62333

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re Applications of)	
)	
LORENZO M. MILAM & JEREMY D.)	DOCKET NO. 15615
LANSMAN, A PARTNERSHIP)	File No. BPH-4218
St. Louis, Missouri)	
)	
CHRISTIAN FUNDAMENTAL CHURCH)	DOCKET NO. 15617
St. Louis, Missouri)	File No. BPH-4402
)	
For Construction Permits)	

MEMORANDUM OPINION AND ORDER

By the Review Board:

1. The Review Board has before it for consideration the Broadcast Bureau's motion to include an antenna site availability issue with respect to the application of Lorenzo W. Milam & Jeremy D. Lansman (Milam & Lansman). ^{1/}

2. The mutually-exclusive applications of Milam & Lansman and of Christian Fundamental Church for construction permits for a new FM broadcast station on Channel 273, St. Louis, Missouri, were designated for hearing by Commission Order (FCC 64-821), released September 8, 1964, and published in the Federal Register (29 F.R. 12853) on September 11, 1964. The designation Order specified an issue relative to the areas and populations to be served by the proposals and the standard comparative issue. The engineering portion of the Milam & Lansman application indicated that the proposed antenna would

^{1/} The pleadings before the Review Board include: (1) Motion to enlarge issues, filed December 7, 1964, by the Broadcast Bureau; (2) Composition, filed December 15, 1964, by Lorenzo W. Milam & Jeremy D. Lansman, A Partnership; (3) Reply, filed December 21, 1964, by the Broadcast Bureau; and (4) Comments in support of Broadcast Bureau's petition to enlarge, filed December 22, 1964, by Christian Fundamental Church. In its Comments in support of Broadcast Bureau's petition to enlarge, Christian Fundamental Church incorporates, by reference, its petition for enlargement of issues, filed December 22, 1964, which requests the addition of antenna site availability and misrepresentation issues against Milam & Lansman. Said petition for enlargement of issues will be the subject of a separate Memorandum Opinion and Order when all related pleadings have been filed.

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be mounted on the upper portion of a guyed tower of 116 feet to be installed at the present location of a 56-foot tower currently being used by Radio Station KADI-FM on the roof of the Continental Building in St. Louis, Missouri. ^{2/} In a Memorandum Opinion and Order (FCC 64R-561), released December 16, 1964, the Review Board denied a motion to include a site availability issue against Milam & Lansman, which was requested by Christian Fundamental Church, on the grounds that the motion was procedurally and substantively deficient. Nevertheless, the Board noted that the Broadcast Bureau had directed an inquiry to the management of the Continental Building relative to the proposed antenna site of Milam & Lansman, and the Board stated that its denial of the Christian Fundamental Church motion did not preclude future consideration of the question if newly-discovered facts so warranted.

3. On the basis of the reply received from the management of the Continental Building, the Bureau moves that a site availability issue be added against Milam & Lansman. In that reply, dated December 2, 1964, and attached to the Bureau's motion, Thelma M. Tucker, rental agent for the Continental Building, states that she had no correspondence or any other contact with Jeremy Lansman prior to September 25, 1964, and that she has found no evidence of a request by Milam & Lansman to

use the roof of the Continental Building. The rental agent also points out that she has not given anyone the right to construct a tower or add to the existing tower on the building's roof; that she does not have the authority to grant such permission; and that proposed construction could not be authorized to anyone without appropriate sketches and engineering data. Miss Tucker claims that no one has submitted any such sketches or engineering data to her or to the owner of the building. In light of these remarks by the rental agent, the Bureau claims that the availability of the antenna site of the partnership for its proposed use is in doubt and that the requested issue should be added.

4. Milam & Lansman initially contend that the Bureau's motion is procedurally defective under Section 1.229 of the Commission's Rules in that the statement of the rental agent is not under oath. Milam & Lansman also oppose the Bureau's position on the merits in that the partnership satisfied itself through personal inquiries and correspondence that it could secure the site; an affidavit of Jeremy D. Lansman, dated December 15, 1964, is attached to the partnership's opposition in support of this contention. In the affidavit, Lansman avers that, prior to the filing of the Milam application, he made several inquiries concerning a suitable site and, as a result, received a letter from the Continental Building realtor, which letter was signed by

^{2/} In Federal Aviation Agency Form 117 (attached to the engineering portion of the partnership application), the consulting engineer for Milam & Lansman indicated that a permanent alteration was proposed to increase the height of an existing antenna structure by 60 feet and to install a side-mounted antenna atop the Continental Building.

a Mr. Brennan. Lansman states that he subsequently requested a sample lease from the realtor on several occasions and that, while no lease was ever received, Lansman was told that space was available for a tower for an FM station. When the question of site availability was first raised

by Christian Fundamental Church, Lansman claims that he contacted the realty company again and was assured that space is available on the roof of the Continental Building for three more stations. In support of this statement, Lansman attaches a letter from Thelma Tucker, dated October 19, 1964, wherein she states that she has been unable to locate a file or any proposal for a lease regarding the partnership; however, she does confirm space availability to a Commission licensee whose equipment is compatible with existing equipment located on the existing tower of the building. Lansman, in his affidavit, also claims that he has consulted with a Mr. Cervanties of the Continental Building who has informed Lansman that the tower structure proposed by the partnership could be placed on the building. Since use of the Continental Building has not been ruled out by the building's rental agent and since the partnership has in fact been asked to submit plans and specifications for the rental agent's use in making a lease of the site, Milam & Lansman contend that they have adequately demonstrated reasonable assurance that they may secure the right to use the site.

5. The Bureau's request to include a site availability issue against Milam & Lansman is not supported by an affidavit of the rental agent for the Continental Building. See Section 1.229(c) of the Rules. The Board notes, however, that the reply received to the Bureau's certified, special delivery letter is supported in all particulars by the rental agent's affidavit of November 12, 1964, which was submitted with the petition for enlargement of issues, filed by Christian Fundamental Church on December 22, 1964. While it may be true that the rental agent has not ruled out the use of the Continental Building by the partnership, the Board cannot agree that Milam & Lansman have demonstrated thereby the availability of the proposed antenna site for the intended purpose. In the opposition, itself, it is shown that the partnership does not now have an agreement or commitment for the proposed site and that such commitment requires the submission and approval of engineering plans relative to the partnership's anticipated construction.^{3/} Since

Milam & Lansman have not submitted such plans and since the right to use the proposed site depends upon the approval of such plans by the management of the Continental Building, the Board is unable to find even reasonable assurance of the availability of the antenna site proposed by the partnership.

^{3/} The Milam & Lansman proposal apparently anticipates either an increase in the height of the existing tower on the roof of the Continental Building or the erection of a separate tower to support its antenna, also located on the building's roof. In either case, the rental agent for the building denies the existence of any such initial authorization to the partnership or to anyone else.

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6. The Board's opinion, in this regard, does not mean that a binding arrangement is needed to demonstrate site availability. See Eastside Broadcasting Co., FCC 63R-528, 1 RR 2d 763 (1963). Commission requirements are satisfied when an applicant proposes a site with reasonable assurance in good faith that the site will be available for the intended purpose. Beacon Broadcasting System, Inc., FCC 61-684, 21 RR 727 (1961). Because of the extensive alterations which Milam & Lansman propose to make on the roof, together with the fact that approval of the plans is a prerequisite to the use of the roof, and since it is not clear that the roof of the Continental Building is available to Milam & Lansman, Milam and Lansman have not demonstrated satisfactorily that there is reasonable assurance of the approval of said construction, and an issue will therefore be added to determine the availability of the specified site for the use proposed. See Edina Corp., FCC 62R-82, 24 RR 455 (1962). The Board's disposition of the Bureau's motion does not, however, comprehend a determination of the suitability of the proposed antenna site and the Board notes the absence of any factual allegations concerning such a question. ^{4/}

ACCORDING, IT IS ORDERED, This 18th day of January, 1965,
That the motion to enlarge issues, filed December 7, 1964, by the
Broadcast Bureau, IS GRANTED; and the issues in this proceeding
ARE ENLARGED by the addition of the following:

"To determine whether there is reasonable assurance that
the antenna site proposed by Lorenzo W. Milam & Jeremy
D. Lansman, A Partnership, is available for its proposed
use."

[SEAL]

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple
Secretary

Released: January 18, 1965

[Signed & Mailed -Jan. 19, 1965]

^{4/} Since the basis of the Bureau's motion involves newly-discovered
facts, the Board finds good cause for the delay in the filing of its motion
under Section 1.229(b) of the Rules.

[RETURN RECEIPT REQUESTED
FEE PAID]

[CERTIFIED MAIL
NO. 97330]

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M & L Exhibit No. 16
Docket 15615

LEASE OPTION AGREEMENT

This agreement entered into this 2/10-65 day of February, 1965,
by and between Harold Koplar, A. J. Cervantes and Morris Shenker,
d/b/a, Harold Koplar & Associates, herein referred to as Lessors, and
Lorenzo W. Milam and Jeremy D. Lansman, herein referred to as
Lessees.

WHEREAS, Lessors own certain radio tower facilities located on the roof of their building known as Continental Towers, 3615 Olive Street, St. Louis, Missouri, and are desirous of leasing said facilities to Lessees, and

WHEREAS, Lessees are desirous of leasing said facilities if and when their application for license for 102.5 frequency is approved by the Federal Communications Commission in a case now pending before that agency and identified as F.C.C. File No. BPH-4218.

NOW THEREFORE, in consideration of the sum of \$300.00 Lessors grant to Lessees an option to lease the aforesaid tower facilities for installation and operation of radio, tower, transmission and antenna equipment on the following terms:

1. Lease will provide that use conform to all necessary governmental laws and regulations, and shall not abridge prior rights of other lessees.
2. Lease will provide for a term of five years with option to renew for another five years upon sixty days, prior to end of initial term, written notice to Lessors.
3. Rental for said five years term shall be \$18,000.00 payable in installments of \$300.00 per month in advance on the first day of each month, plus 5-1/2¢ per K.W.H. of electricity used which also shall be payable monthly when billed.
4. This option shall run for a period until Lessees are granted aforesaid applied for license by F.C.C., or for

four months following final denial of said application for license, and in no event shall this option extend past a period of two years from the date of this Lease Option Agreement.

WHEREFORE, in consideration of each others promises, the parties hereto subscribe their names.

Lessors:

HAROLD KOPLAR & ASSOCIATES

By: /s/ Thelma M. Tucker
Rental Agent

Lessees:

LORENZO W. MILAN

/s/ Jeremy D. Lansman
JEREMY D. LANSMAN

[508]

[Released: April 12, 1965]

FCC 65D-14
66424

INITIAL DECISION OF HEARING EXAMINER
JAY A. KYLE

Preliminary Statement

1. This proceeding involves the applications of Lorenzo W. Milam & Jeremy D. Lansman, a Partnership, ^{1/} and Christian Fundamental Church, ^{2/} wherein both applicants seek construction permits for Class B FM stations in St. Louis, Missouri, to operate on 102.5 mc/s (Channel 273). The M and L proposal is to operate with effective radiated power of 29.2 kilowatts and an antenna height of 423 feet above average terrain, while the Church proposal is with effective radiated

^{1/} Sometimes hereinafter referred to as "M and L" or "Partnership".

^{2/} Sometimes hereinafter referred to as "Church".

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power of 62.3 kilowatts and an antenna height of 382 feet above average terrain.

2. As the applications are mutually exclusive and only one can be granted, the Commission designated them for consolidated hearing upon the following issues by order released September 8, 1964:

1. To determine the area and population within each of the proposed 1 mv/m contours and the availability of other FM services (at least 1 mv/m) to such areas and populations.

2. To determine, on a comparative basis, which of the proposals would better serve the public interest, convenience, and necessity in light of the evidence adduced pursuant to the foregoing issue and the record made with respect to the significant difference between applicants as to:

a) The background and experience of each having a bearing on the applicants ability to own and operate the FM station as proposed.

b) Proposals of each of the applicants with respect to the management and operation of the FM broadcast station as proposed.

c) The programming services proposed in each of the above-captioned applications.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues which of the applications should be granted.

3. The application of another original applicant herein, namely, M. R. Lankford, tr/as M. R. Lankford Broadcasting Co., Docket No. 15616, was dismissed with prejudice by an order of the Hearing Examiner released September 23, 1964 (FCC 64M-941).

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4. Subsequently, by Memorandum Opinion and Order released January 18, 1965 (FCC 65R-20), the Review Board enlarged the issues by adding the following:

To determine whether there is reasonable assurance that the antenna site proposed by Lorenzo W. Milam & Jeremy D. Lansman, A Partnership, is available for its proposed use.^{3/}

5. A prehearing conference was held on October 1, 1964 and the evidentiary hearing was held on December 8, 9, 10, 11 and 14, 1964. The record was closed on the latter date. However, through the enlargement of the issues by the Review Board just referred to, the record was reopened, a hearing conference was held on January 26, 1965 and further evidentiary hearing was held on February 11, 1965, on which date the record was again closed. Proposed Findings of Fact and Conclusions of Law were filed March 3, 1965 by M and L and the Broadcast Bureau, and on behalf of the Church on March 4, 1965. Replies were filed on March 15, 1965 for the Church and the Partnership.

Findings of Fact

6. Two applicants are here seeking construction permits for Class B FM Stations in St. Louis, Missouri, to operate on 102.5 mc/s (Channel 273). M and L seeks to operate with an effective radiated power of 29.2 kilowatts and an antenna height of 423 feet above average terrain. The other applicant, Christian Fundamental Church, proposes to operate with an effective radiated power of 62.3 kilowatts and an antenna height of 382 feet above average terrain. The transmitters proposed by both applicants are to be located 807 feet above mean sea level on top of the Continental Building in St. Louis.

7. St. Louis, Missouri, has a population of 750,026 persons and the St. Louis urbanized area comprises 1,667,693 persons.^{4/}

^{3/} Hereinafter referred to as "Added Issue".

^{4/} All population data herein are from the 1960 United States Census of Population.

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8. At the present time there are eight AM stations, six FM stations and six TV stations authorized in St. Louis.

The Partnership Applicant:

9. The M and L partnership consists of Lorenzo W. Milam and Jeremy D. Lansman. Milam was born in Jacksonville, Florida, on August 2, 1933. After attending elementary and junior high school in that city, he was graduated from the Lawrenceville Preparatory School in Lawrenceville, New Jersey in 1951. He attended Yale University during the school year 1951-1952 and worked part-time for a student radio station in the spring of 1952. In the summer of 1952, Milam worked for Station WIVY, Jacksonville, Florida. After an illness, he entered Haverford College, Haverford, Pennsylvania, and was graduated in 1957. During his school years at Haverford, he worked part-time on a radio station in addition to extra curricular activities as a student. Milam worked a few months for WFIL in Philadelphia after graduating from Haverford and the following November he went on to the University of California at Berkeley to work on a Master's degree. In February 1958, he started doing volunteer work at Stations KPFA and KPFB, the Pacifica Stations in Berkeley. He moved to Washington, D.C., in 1959. Subsequently, Milam was the principal in an application for a non-commercial FM broadcast station in Washington, D.C., in 1959. The application was not granted. In 1961 Milam was granted an application for an FM station in Seattle, Washington, where he established Station KRAB, which commenced operation in December 1962. Milam has been general manager of that station and its guiding hand since its inception. Milam organized the Jack Straw Memorial Foundation of which he is president and founder. This

foundation is now the licensee of Station KRAB. Milam has never lived in St. Louis and he does not propose to live there in the event a construction permit is granted the Partnership. Milam draws no compensation from the Seattle station and does not contemplate drawing any salary from the proposed St. Louis station. The source of funds for the St. Louis proposal will be exclusively from Milam's personal funds. He has an independent income derived from dividends and interest on security investments.

10. Jeremy D. Lansman is 22 years old. He was born in Los Angeles, California, in 1942. Sometime in his early life he moved to St. Louis to reside with his father but at

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the age of 15 he then moved to San Francisco to live with his mother. This was in 1957. He displayed an early interest in radio and it is obvious that this field is Lansman's hobby. Lansman did not graduate from high school and after doing odd jobs as a volunteer worker for three radio stations, he went to work for Station KHOE, Truckee, California, in May 1961 as chief engineer and was subsequently sent by the owner of KHOE to build an AM station in Hawaii. The following February (1962) Lansman went to Seattle, Washington, and commenced working for Station KRAB. He described the nature of his work as all phases "from program production to floor sweeping". Lansman made a visit to St. Louis in 1961 and again in 1963 after the filing of the original application by Milam.^{5/} In 1964 prior to the evidentiary hearing Lansman returned to St. Louis and made a concerted study relating to programming for the partnership in that city. On one trip Lansman endeavored to raise finances for the proposed station. As related above, the source of financing of this enterprise is from Milam's funds as the resources of Lansman are meager. If the application is granted to Milam and Lansman, Lansman will be general manager of the station

and he will reside in that city. When Lansman was in St. Louis in the fall of 1964, he made an investment in a bookstore. Lansman, outside of his residency when he was a child, has not had a permanent residence in St. Louis. At the time of the evidentiary hearing Lansman's temporary address was Washington, D.C.

Christian Fundamental Church:

11. The Christian Fundamental Church is a non-profit, non-stockholding, religious, educational, benevolent and scientific organization. It was incorporated in 1946. Reverend Joseph L. Autenrieth is president, an office which he has held since incorporation, while the Reverends Eugene L. Maxey and H. Ralph Hebblethwaite are vice-president and secretary-treasurer, respectively. These three individuals are all of the officers and directors of the corporation. The church is evangelical in doctrine with Reverends Autenrieth, Maxey and Hebblethwaite as

^{5/} Milam filed the application as an individual on October 26, 1963 (File No. BPH-4218). Lansman testified that they discussed the partnership venture in late 1963. He said "this was approaching Christmas". On March 13, 1964, the application was amended and it now reflects the partnership entity.

its ministers. The Church has one congregation with approximately 200 members, although at times 1,000 persons attend weekly services. The radio station will operate under the corporate charter of the Christian Fundamental Church. Additionally, the Church operates three private schools, including an elementary school, a junior high school, and a senior high school. The total enrollment of the schools is over 250 students. The schools conduct adult evening classes on the high school and college levels; the latter in cooperation with the Extension Department of the University of Missouri, which supplies texts for utilization

by the school. The schools employ twelve teachers. Students in the schools are not under obligation to attend services of the Church.

The Church Officers:

12. Joseph L. Autenrieth is president, chief executive officer and pastor of the Church and superintendent of the three Christian Fundamental Schools. He was born in 1924 in Herculaneum, Missouri, and was educated in the public schools of Herculaneum and Festus, both of which are near St. Louis. He has attended Harris Teachers College and Brooks Bible Institute at St. Louis, as well as having taken correspondence courses from the University of Missouri and the American Bible College of Chicago. Reverend Autenrieth has lived in St. Louis since he was 18 years of age and as head of the Church, besides its affiliated organizations, has had daily contact with residents in the St. Louis metropolitan area. He has been active in various temperance, civic and evangelical organizations. Further, in recent years, he has broadcast on more than a dozen mid-western stations the program "Temperance Crusade", a program relating to the traffic of alcohol and narcotic drugs.^{6/} At present he has a fifteen-minute program broadcast each week by Station WGGH at Marion, Illinois. His weekly Sunday morning sermon has been broadcast in the past by Station KJCF at Festus, Missouri. His duties in addition to the administrative responsibilities of the Church and schools include visiting the sick, delivering sermons, teaching in the schools, performing weddings, funerals, baptismals, delivering invocations, benedictions and addresses to War Dads and other civic groups.

^{6/} For four years the "Temperance Crusade" program was carried daily by Station KSTL in St. Louis.

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13. H. Ralph Hebblethwaite was born July 3, 1938 in St. Louis, Missouri. He attended public schools through the seventh grade in St. Louis. His family moved to Godfrey, Illinois, where he was graduated from the Summerfield Elementary School. The family returned to St. Louis in 1952 and he was graduated from Roosevelt High School in 1956. In 1956 he enrolled as a philosophy and religion major in Greenville College of Liberal Arts at Greenville, Illinois, from whence he was graduated with a Bachelor of Arts degree in 1960. Greenville, Illinois, is about 50 miles from St. Louis. While in college, Hebblethwaite was announcer and newscaster of the campus radio station. In July 1960 he was ordained a minister and assumed the duties of assistant pastor of the Church and principal of its elementary school. He is doing post-graduate work at Harris Teachers College and it is proposed that he will be program director of the Church's station if its application is granted.

14. Eugene L. Maxey was born on March 1, 1932 in Licking, Missouri. He attended public schools in that city and was graduated from high school in 1950. Upon graduation he moved to St. Louis and was there employed until he entered the military service in 1952. He served in the Korean War and was honorably discharged from the Army in 1954. Upon discharge, he returned to St. Louis and later enrolled at Greenville College. He received his Bachelor of Arts degree from Greenville in June 1958. Following graduation from Greenville he was ordained to the Christian Fundamental Church ministry by Reverend Autenrieth and was appointed principal of the Church's junior and senior high schools, a position which he currently holds. At present Reverend Maxey is working on a Master's degree at the University of Missouri. He has had no radio experience.

Program Planning:

15. The Partnership: Although, as indicated heretofore, Milam had filed the application for an FM station in St. Louis in 1963, the record is void of any study or investigation on his part of the programming needs for a St. Louis station. The evidence discloses no contacts that Milam made in St. Louis. His testimony was to the effect that he had "visited St. Louis". In his presentation, Milam gave considerable testimony relating

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to his experience with Station KRAB since it went on the air in Seattle in December 1962. However, as Milam was not able to demonstrate his familiarity with the programming needs for St. Louis, the comparability of the Seattle station's past programming bears no relationship to an unknown potential listening audience in St. Louis. The other partner, Lansman was in St. Louis on a visit in 1961 and again in 1963, just after the filing of the original Milam application (see paragraph 10, footnote 5, supra). However, he had no formal record of any St. Louis contacts that he made on those visits. Among the objectives of one visit was to seek local financing for a radio station. In September 1964 Lansman was again in St. Louis to study program source material and needs for the city. As a result of his stay in St. Louis, Lansman testified that he made 37 personal contacts, 16 telephonic contacts and many other contacts were made through a questionnaire. ^{7/} It is evident that Lansman contacted a representative group of St. Louis citizens. It is to be pointed out here that the programming as proposed by the M and L application was filed with the Commission several months in advance of the last visit to St. Louis by Lansman. The Lansman contacts in the fall of 1964 were made prior to the evidentiary hearing, which commenced on December 8, 1964.

16. The Church: In 1957 the Church evidenced some interest in establishing a radio station in St. Louis. However, formative plans were not firmly developed until 1963. The record is clear that the leader for the establishment of a station on behalf of the Church was Reverend Autenrieth. It is singularly to note from the evidence, however, that Autenrieth had a definite conception respecting the station format before he submitted his ideas to local citizens. He had visited and discussed with the staff of Radio Station WGGH of Marion, Illinois, the various facets of broadcasting. He at the time of the hearing had been broadcasting a weekly program from that station. In addition, he had discussed the management and development of an FM station with a sales engineer of an equipment company, an engineer of an FM station, a salesman for Station KSTL, St. Louis, an educator, St. Louis businessmen, and others with whom he was acquainted in his home town of St. Louis. Further, he had discussed the proposed station operations with an announcer of Station KXOX of St. Louis and with other religious leaders in St. Louis. Likewise, he had visited with a Granite City, Illinois, station owner

^{7/} The evidence is in conflict as to the exact number of contacts that Lansman made.

relative to the need for FM broadcasting after sundown and the need for coverage of high school sporting events. Autenrieth also discussed potential programming with at least four school teachers in St. Louis. Other contacts that were made on behalf of the Church proposal by Reverend Autenrieth included housewives, the president of St. Louis University, the administrative assistant to the Mayor of St. Louis, a university broadcaster for radio and TV, and the administrative assistant to the Chancellor of Washington University, St. Louis. From the record, it appears that most of the Autenrieth contacts were for the express

purpose of obtaining support for his ideas respecting the station. He relied principally on his own knowledge in determining what he considered as the public needs for the Church station. The other two directors of the Church corporation, namely, Reverends Maxey and Hebblethwaite participated to only a limited degree in the preparation and planning for the Church's proposed St. Louis station. The Church has organized a program advisory committee presently consisting of a total of five members, one each in the fields of religion, business, education, law, and broadcasting. The activities of this committee have been very few, if any, as the committee was selected only a short time prior to the evidentiary hearing.

Programming:

17. The Partnership: The M and L proposal embodies 102-1/2 hours of weekly programming. The percentages of time that would be devoted to each of the following types of programs are as follows:

Entertainment	82.2%
Religious	6.1
Agricultural	0.3
Educational	2.5
News	5.3
Discussion	1.4
Talks	2.1
Radio Plays	0.1

18. The percentages of time to be devoted to each of the following classes of programs during a proposed typical week of operation are:

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	<u>8 a.m.- 6 p.m.</u>	<u>6 p.m.- 11 p.m.</u>	<u>All Other Hours</u>	<u>Total</u>
Network commercial	0	0	0	0
Network sustaining	0	0	0	0
Recorded commercial	84.6	76.4	100	83.3
Recorded sustaining	1.3	0	0	0.7
Wire commercial	0	0	0	0
Wire sustaining	0	0	0	0
Live commercial	3.3	19.3	0	8.3
Live sustaining	10.8	4.3	0	7.7
Total commercial	87.9	95.7	100	91.6
Total sustaining	12.1	4.3	0	8.4
Proposed Broadcast Hours (per week)	58	35	9.5	102.5
No. of Spot Announce- ments (per week)	375	210	55	640
No. of Noncommercial Spot Announcements (per week)	105	70	20	195

19. Entertainment programming will be made up of the following programs:

"Kaleidoscope," a program approximately 70 percent music, also containing short features, news reports, poetry, interviews, drama, readings from magazines and newspapers. The program will feature a variety of music from jazz to classical, depending on the mood of the program.

"Noon Concert," is a program of classical music.

"International Report," includes a program of readings from international journals and selected tapes from short wave broadcasts.

"Commuters Concert," is light classical and popular jazz.

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"Sunset Concert," is chamber music.

"Adventures in Sound," will be an exploration of the archives of recorded sound. The program may be historical, political, news, musical, or other content.

Other entertainment programming includes features to be known as:

"Below Gaslight Square," "On Gaslight Square," "The New Music Presents," "Evening Concert," "Hi-Fi to You," "Reflections," "Two-Beat Music Box," "Music Festival," "New Releases," and "Jazz to You."

20. Religious programming will include "Today's Service," a program of a sermon or complete service recorded at a local church or temple. Each week there will be presented a different service, rotating the program among the city's churches and synagogues as much as possible. Additionally, there is a program "Hours of Devotion," on Sunday night.

21. Agricultural programming will be composed of the program "Farmland Speaks," a program dealing mainly with agricultural politics. The program will not concentrate on market reports.

22. Educational programming will consist of "University Notebook," "Literature Laboratory," and "From the Library."

23. News programs will consist of "Daily Capsule," a listing of area events; "Short Report News," a report for about five minutes on one recent news item, concentrating on local news; "News in Depth," a report in depth of news gathered from short wave radio, newspapers and magazines from the United States and around the world, and stringers spotted in local government. Milam and Lansman propose to employ a full time news analyst after the station is able to gross \$40,000 yearly. This proposed St. Louis station will make use of a correspondent in the State Capital of Missouri, Jefferson City. The M and L plan does not provide for a news wire service.

24. Discussions will be aired on the program "The Roundtable," which will be a live panel discussion program.

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25. Talks would be given which would include various opinions on political, economic, or social subjects. These talks would encompass all points of views by speakers in the St. Louis area or as recorded from other radio sources. This program will present opinions on a basis of an editorial, and the program will be designed as an improvement over the ordinary editorial. The station itself will not generally take a stand or position or be biased for one group or another. "This Week at the UN" and "Film Review" are other "Talk" programs to be utilized.

26. The station proposes to present drama produced locally on the weekly program to be known as "Radio Play."

27. In addition to the list of programs set out above, M and L proposes to present other programs, such as the presentation of live music, drama broadcasts, including BBC material, musical education programs and others.

28. The proposed station will have tape recording facilities which will be portable and capable of remote broadcast.

29. Christian Fundamental Church: The proposal of the Church includes 126 hours of weekly programming. The breakdown of the proposed programming by type and class is as follows:

Analysis By Type

Entertainment	42.2%
Religious	20.5%
Agricultural	5.3%
Educational	9.3%
News	13.9%
Discussion	5.1%
Talk	3.7%

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Analysis By Class And Other Data

	<u>8 a.m.- 6 p.m.</u>	<u>6 p.m. 11 p.m.</u>	<u>All Other Hours</u>	<u>Total</u>
Recorded Commercial	7.9%	-	17.4%	7.3%
Recorded Sustaining	34.1%	48.3%	47.1%	41.4%
Wire Commercial	11.9%	6.7%	18.9%	10.2%
Wire Sustaining	.6%	-	-	.4%
Live Commercial	28.9%	-	8.3%	17.5%
Live Sustaining	16.6%	45.0%	8.3%	23.2%
Total Commercial	48.7%	6.7%	44.6%	35.0%
Total Sustaining	51.3%	93.3%	55.4%	65.0%
Proposed Broadcast Hours	70	35	21	126
Number of Spot Announcements	350	150	84	584
Number of Noncom- mercial Spot Announcements	75	90	10	275

30. For entertainment, the music programs will be made up of a wide range of instrumental and vocal selections but the station will not feature either the modern or classical extremes. The musical programs throughout the day will be diversified. During the early morning hours there will be featured "up tempo". At luncheon and dinner hours there will be featured instrumental selections. This applicant proposes to broadcast its music stereophonically approximately three hours each evening and eventually expand the stereophonic operation into afternoon hours.

31. Emphasis will be placed upon religious programs of local origin. Applicant proposes to devote 20 percent of its time to the broadcast of religious programs. The program "The Pastor Speaks" will present local ministers of various faiths in which each speaker shall have considerable latitude in choosing subjects to discuss, and will be expected to do a short series which will be taped for broadcasting at the designated time. The program will open and close with appropriate music.

The program "Gospel Hour" will feature commentary by a local minister on a rotating basis on a passage taken from the New Testament, and will be taped at the station's studios and will include religious music. "Chapel Hour" will be the broadcast of the morning chapel service conducted by the Christian Fundamental Schools. The Music Department of the Schools will participate in this program. The program "World Missions" will be prepared

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by missionaries and will discuss the missionary effort, describe the places and the peoples reached by the missions with stories of missionaries and, at times, include music illustrative of the musical tastes of the missionary country under discussion. "Revival Hour" will consist of a talk by a minister of the various faiths around the St. Louis area, and concern itself with the problems of everyday life, a discussion of modern day morals, and the need for religion in today's world. Religious hymns will be included in this program. The "Bible Class" will be taped by a local Baptist minister specifically for the station. The program will stress the teachings of the Holy Bible as they apply to contemporary life. "The Bible Speaks" will present both ministers and laymen representing various faiths in the St. Louis metropolitan area, who will select and read, without comment, passages taken from scripture. Background music will be featured on this program. The program "Ecumenical Hour" has been included in the enclosed programming schedule in order that the present Ecumenical Movement may be explained and discussed. The program will be furnished the station by churches and groups and associations throughout the country interested in the Ecumenical Movement. "Bedtime Devotions" will be prepared by the station and will consist of a prayer delivered by a minister of Christian Fundamental Church. The Sunday religious programming will feature "Sunday School Preview," taped specifically for the station by area ministers; "Forward

in Faith," produced by a local minister of the Church of God at the station's studios and consisting of religious music and talk by the minister on the subject of his choosing; "Remote Worship Service," a religious service produced by the various faiths in the St. Louis area, on a rotating basis and aimed primarily at "shut-ins;" "Great Commission Hour," the regular Sunday religious services of Christian Fundamental Church; and "Oral Roberts," the nationally known evangelist.

32. As for agricultural programming, from 6:45 to 7:00 a.m., each day, the station will broadcast two programs directed to the agricultural audience; the five-minute program "Farm Markets" will be broadcast of commodity prices and other agricultural features obtained from the station's wire service. A ten-minute program "Farm Information," which will consist of a wide range of information of interest to the farming population, will be supplied the station by the Agricultural Department of the University of Missouri, Columbia, Missouri. The program "County Agent" broadcast each day from 12:15 to 12:30 p.m. will be furnished by various County Agents from Missouri and Illinois counties surrounding St. Louis. This material will include talks on food, food diets and food costs. Home economic

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discussions will be included in the program also, as well as talks on horticulture, raising and care of small fruits, crops, lawns and farm management, and announcements relating to 4-H Clubs. Each afternoon from 4:15 to 4:30, the program "Missouri Botanical Garden" will be broadcast and will present the latest advances concerning indoor horticulture. The program will be produced and taped for the station by the staff of the Missouri Botanical Gardens of St. Louis, and by the "Friends of the Garden," a local group associated with the Missouri Botanical Gardens. "Garden Tips," broadcast each day between 6:15 and 6:30 p.m.,

will inform the listening audience of proven procedures for the planting and care of home gardens, bushes and trees, and lawns, as well as hints for flower arrangements for the home. The program will be produced and taped at the station by members of the St. Louis Garden and Clubs, associated with the Garden Clubs National Council, which has its headquarters in St. Louis.

33. The educational programming includes many features. The faculty of Christian Fundamental Schools, and other local schools, will present the program "Professor McGuffey" each day between 4:30 and 5:00 p.m. The program will be directed to the parents of school-age children and deal with such topics as correct study habits, student incentive and philosophy of education. From 5:15 to 5:30 p.m., the program "A Principal Speaks" will be broadcast each day in which a principal of the Christian Fundamental Schools will discuss general inquiries submitted by members of the listening audience, regarding educational topics. It is anticipated that the speaker on the "Professor McGuffey" program will request the listening audience to send in inquiries to the station, which will be discussed on the program "A Principal Speaks." On the ten-minute program, "Tots to Teens," scheduled for 9:05 p.m., there will be broadcast a program directed to the parents of pre-school and school-age children, apprising parents of area activities available to compliment the formal education of their children, and discuss the programs of such organizations as the Girl Scouts, Boy Scouts, summer camps, youth groups and others. Initially, the program will be produced by the faculty of Christian Fundamental Schools. The program "Temperance Crusade" will be prepared and delivered by Reverend Autenrieth and will concern itself with the virtues of temperance. On the program "History Speaks," an area history teacher will direct talks to the adult listening audience concerning the accomplishments of past United States leaders in the fields of government, the military, science, investment, industry and others.

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34. There will be broadcast throughout the day local, regional, national and international news. Fifteen-minute news programs will be broadcast at 6:30 a.m., 7:00 a.m., 8:00 a.m., 12:00 noon, 5:00 p.m., and 6:00 p.m. Five-minute news programs will be broadcast at 9:00 a.m., 10:00 a.m., 1:00 p.m., 2:00 p.m., 3:00 p.m., 4:00 p.m., 7:00 p.m., 8:00 p.m., 9:00 p.m., 10:00 p.m., and 11:00 p.m. Weather information will be included in all five-minute newscasts and some of the fifteen-minute newscasts. Most of the news will be from a wire service, but some editing is anticipated. Local news obtained from the wire service will be rewritten and associated with local news gathered by the station from other sources.

35. For discussion, the Church has scheduled the program "The Lyceum" within which to air discussion of public issues and current events. Representatives in the fields of government, education, religion, business, science, and others will be asked to discuss local, regional and national topics. On controversial issues all sides will receive equal time.

36. There will be talk programs. Each day at 4:05 p.m., the ten-minute program "Bulletin Board" will include a list of area events, scheduled by the various local religious, civic, social, charitable and fraternal organizations in the area will be broadcast. The station will invite members of the listening audience to telephone in such announcements for broadcast. On the program "Voice of Experience," to be broadcast each day at 5:30 to 6:00 p.m., local residents will provide an informative talk on developments in such fields as education, social work, urban renewal, and juvenile delinquency.

37. In addition to its regularly-scheduled programs, the station proposes to carry other programming material on an irregular basis, such as local and national election returns, political talks and debates of local and national interest, and some local high school basket ball games, on a seasonal basis. By use of noncommercial spot announcements

the station will promote drives for the Heart Fund, United Givers Fund, the March of Dimes, the Red Cross, and other local and national campaigns on behalf of civic, social, religious and charitable organizations.

Personnel and Facilities:

38. The staff for the proposed M and L station will consist of four full-time employees and one part-time employee. Lansman will be general manager and chief engineer, and in addition there will be two announcers, an announcer-salesman, and a secretary-announcer. Outside of Lansman, all other employees have not been designated. The studio facilities will include a

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minimum of three rooms, five reel-to-reel tape recorders, one continuous loop playback unit, one transistorized mixer panel, five turntables, one monitor amplifier and speaker system, two condenser microphones, one telephone patch unit, EBS monitor, and an FM receiver for possible off the air pickup of other FM broadcast stations. All equipment is to be suitable for stereo, as a considerable portion of broadcast time is proposed to make use of this medium.

39. The proposed staff for the Church station includes seven full-time employees and two part-time employees. Reverend Autenrieth will be general manager. Reverend Hebblethwaite will be the program director and Mrs. Maxine Autenrieth, wife of Reverend Autenrieth, will be receptionist and secretary of the station. The selection of the other employees has not been made. The studios of the Church will be located in the Church and school building at Lafayette and Comp-ton Streets in St. Louis. Reverend Autenrieth had previously a few years ago discussed with representatives of a manufacturing concern the proposed studio, who found it to be adequate and desirable. He has also discussed the studio and technical equipment with other persons.

Coverage of Both Proposed Stations:

40. The M and L predicted 1 mv/m field strength contour is encompassed entirely by the Church's predicted field strength 1 mv/m contour. However, there is apparent disagreement as to the location of these contours, as well as the location of the predicted 1 mv/m contours of certain stations whose field strength contours delimit the areas where only two or three other FM services are received. In addition to the showings made by the applicants, the Broadcast Bureau also submitted evidence concerning the location of the several contours. Predictions of coverage were made pursuant to Section 73.313 of the Commission's Rules, which requires the use of the F (50,50) field strength chart identified as Figure 1 of Section 73.333. Figure 1 of Section 73.333 is so constructed that at field strength contour distances beyond 20 miles, reference points for interpolation are spaced at five mile intervals. The interval spacings with increasing distance are not uniform and because of the manner in which the chart is constructed some differences can be expected in the results obtained by users of the chart. In the following table there are shown the distances along the standard radials to the predicted 1 mv/m contours of the proposed stations and that of three existing stations as determined by the respective engineers representing M and L, the Church and the Broadcast Bureau:

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	<u>Bearing</u> <u>(Degrees)</u>	<u>Radiation Center</u> <u>(HAAT in feet)</u>	<u>Distance to 1 mv/m Miles</u>		
			<u>M & L</u>	<u>Bureau</u>	<u>Church</u>
<u>M & L:</u>					
(29.2 kw)	0	426	28.5	27.8	28
	45	475	29.5	29.3	29
	90	479	29.5	29.3	29
	135	472	29.5	29.3	29
	180	453	28.8	28.6	28.5
	225	383	27	26.4	26.5
	270	377	27	26.4	26.5
	315	316	24.5	24.4	24
<u>Church:</u>					
(62.3 kw)	0	374	30.5	30.8	31
	45	436	32	32.5	33
	90	445	32.5	32.7	33
	135	437	32	32.5	33
	180	419	31.5	31.9	32
	225	338	29.5	29.3	30
	270	330	29.4	29	30
	315	278	28	27.2	28
<u>KSTL-FM:</u>					
(78 kw)	0	327	30	30	30
	45	315	29.8	29.5	29
	90	260	27	27.5	27
	135	249	26.5	27	27
	180	197	24.5	24.1	24.5
	225	285	29	----	28.3
<u>KSHE:</u>					
(25.5 kw)	135	267	22.5	22	22
	180	243	21.5	21	21.4
	225	222	20	--	21
<u>WOKZ-FM:</u>					
(3.2 kw)	45	276	15	15	15

41. The distances to the predicted 1 mv/m field strength contours set forth in the table in the preceding paragraph reflects the independent judgment of the respective engineers. It will be noted that in the main the distance to the predicted 1 mv/m contours for both proposed stations as determined by the Broadcast Bureau's engineer falls between that determined by the engineers for the respective applicants. Moreover, compared to the Bureau's figures, M and L and Church show less departure than a direct comparison between the M and L and Church data. For these reasons it

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is found that the independent determinations submitted by the Broadcast Bureau on the whole represent a fair portrayal of the extent of the proposed service area. On this basis, Church's predicted 1 mv/m contour would extend variously from 2.6 miles to 3.4 miles beyond M and L predicted 1 mv/m contour. Within their respective contours M and L would serve 2,004,386 persons in an area of 2,425 square miles and Church would bring a new service to 2,051,614 persons in a 2,995 square mile area. The result is that Church would not only serve all of the area in which M and L would provide service, but would also serve an additional 47,228 persons in an area of 570 square miles.

42. A total of twelve stations provide an FM signal of 1 mv/m or greater to all or some part of the areas enclosed by the M and L and Church 1 mv/m contours. These stations and the proportion of the respective proposed service areas served by each are shown in the following table:

<u>Station</u>	<u>Location</u>	<u>M & L (%)</u>	<u>Church (%)</u>
KCFM	St. Louis, Mo.	100	100
KMOX-FM	St. Louis, Mo.	100	99
KADI	St. Louis, Mo.	75-100	70
KSTL	St. Louis, Mo.	75-100	75
WIL-FM	St. Louis, Mo.	75-100	75
KSLH	St. Louis, Mo.	50-75	50
KFUO-FM	Clayton, Mo.	0-25	27
KSHE	Crestwood, Mo.	25-50	46
WOKZ-FM	Alton, Ill.	25-50	19
WCBW	Columbia, Ill.	0-25	15
WAMV-FM	E. St. Louis, Ill.	50-75	33
WGNO	Madison, Ill.	0-25	15

In the aggregate the above stations make available from two to eleven services in any one part of each of the proposed service areas. M and L would provide a third service to 754 persons in a 38 square mile area some 25 miles south of St. Louis. Nearly all of this area lies to the east of the Mississippi River in the State of Illinois. The Church would not only provide a third service to an additional 23,409 persons in a 245 square mile area extending as a narrow curved strip from north of St. Louis clockwise to south of the city and which falls almost entirely within Illinois. In all, Church would make available

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a third service to a total of 24,163 persons in an area of 283 square miles.^{8/} In summation, the Church's proposed coverage more than blankets the area and population that M and L seeks to serve in this proceeding.

The Added Issue:

43. The issue that was added^{9/} in essence is simply whether there is reasonable assurance that the antenna site proposed by M and L is available for its proposed use. After the issue was added, the record reopened, a further evidentiary hearing was held on February 11, 1965, at which time the Partnership presented as its witness Miss

Thelma M. Tucker of La Due, Missouri. The Partnership and the Church propose to locate their antennae on the Continental Building in St. Louis, Missouri. The Continental Building is owned by Harold Koplar & Associates, and Miss Tucker is the rental agent for that firm. Miss Tucker sponsored M and L Exhibit No. 16, which was a signed lease-option agreement entered into by and between Harold Koplar, A. J. Cervantes and Morris Shenker, d/b as Harold Koplar & Associates, on one hand, and M and L on the other. The tendered exhibit was received in evidence. The option agreement provides for the lease of certain space on top of the Continental Building which is "for installation and operation of radio, tower, transmission and antenna equipment" on certain terms. The document was dated February 10, 1965 and Miss Tucker's testimony related, in part, to her authority respecting her employment. Miss Tucker testified that she had the lease-option agreement drawn the previous day and that the lessees were Milam and Lansman. She further testified that she was authorized to sign leases and options on behalf of Harold Koplar & Associates and added "I represent them, and they are responsible for any of my signatures." She testified further that she does not sign lease agreements but has authority to sign option agreements. The testimony is to the effect that she had worked for Koplar for 15 to 18 years and that she had a wide latitude of discretion in the performance of her duties as rental agent. This witness concluded that her principal stood ready to carry out the terms of the lease agreement in the event its terms are consummated. ^{10/}

^{8/} Based on their respective distance determinations, M and L would claim a third service to 273 persons in 40 square miles and Church 28,943 persons in 345 square miles.

^{9/} See Paragraph No. 4, supra.

^{10/} The Review board stressed in its Memorandum Opinion and Order (FCC 65R-20) that the added issue related only to the availability of the proposed site and not the suitability thereof.

Conclusions

1. The two applicants are seeking construction permits for new Class B FM stations to operate on 102.5 mc/s, (Channel 273) in St. Louis, Missouri. They are a Partnership comprised of Lorenzo W. Milam and Jeremy D. Lansman, and Christian Fundamental Church. The proposal of the Partnership is to operate with an effective radiated power of 29.2 kilowatts and an antenna height of 423 feet above average terrain. The Church desires to operate with an effective radiated power of 62.3 kilowatts and an antenna height of 382 feet above average terrain. The designation order found both applicants to be legally, technically, financially and otherwise qualified to construct and operate their proposed stations except as to the specified issues.

"Added Issue":

2. The first conclusion to be reached is to determine if M and L has met the burden of proof respecting the "Added Issue," which is — whether there exists reasonable assurance that the antenna site proposed by the Partnership is available for its use. Both proposals expect to use as transmitter site the roof of the Continental Building in St. Louis. The rental agent for the owners of the Continental Building appeared as a witness on behalf of M and L after the record had been reopened to hear evidence on the "Added Issue". She detailed at length her responsibilities with the building owners and her authority to enter into lease-option agreements on behalf of them. The witness sponsored an exhibit which was a lease-option agreement duly executed between Harold Koplar, A. J. Cervantes and Morris Shenker, d/b as Harold Koplar & Associates, the owners, and M and L concerning an option to rent space on the building roof for a transmitter site in the event a construction permit is granted the Partnership. The document, dated February 10, 1965, detailed the terms of the agreement and the only conclusion that can be drawn from the evidence of this case is that the "Added

Issue" must be resolved in favor of M and L. The "Added Issue" concerns only the availability of the proposed site and not the suitability thereof.

Coverage:

3. There is no question here but that the Church's predicted field strength of 1 mv/m contour will more than cover the predicted 1 mv/m field strength contour of the M and L proposal. The two applicants sharply disagree on certain aspects

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of the engineering facets of this case. Because of the apparent irreconcilable positions of the applicants on this matter, the Broadcast Bureau offered certain evidence respecting predictions of coverages which was embodied in its Exhibits Nos. 1 and 2 referred to herein in the Findings of Fact, paragraphs 40-42, supra. The Hearing Examiner has accepted the Broadcast Bureau's evidence at face value on this matter in the findings to which reference has been made heretofore. Therefore, in resolving the differences between the contentions of the applicants respecting the coverage, it is concluded that the Church's prediction of 1 mv/m field strength contour would include all of the area encompassed by M and L's 1 mv/m contour and extend in areas from 2.6 to 3.4 miles beyond the Partnership contour. The service that would be provided by M and L within its 1 mv/m contour would extend to 2,004,386 persons in 2,425 square miles. However, the Church would bring its service to 2,051,614 persons in an area of 2,995 square miles. The result is that the Church would serve an additional 47,228 persons in an area of 5,070 square miles besides all of the area to which M and L would provide service. Within this latter area the Church would bring a third FM service to 23,409 persons in 245 square miles. Christian Fundamental Church is entitled to a substantial preference because of its greater coverage of both population and area.

Planning:

4. Neither applicant adequately followed the criteria for program planning as enunciated by the Commission in 1960. However the Church is entitled to a minute preference in view of the minimal nature of the planning that both applicants gave their respective St. Louis proposals. The Commission in its Programming Policy Statement, 20 RR 1901, 1915 (1960) said, in part, "What we propose will not be served by pre-planned program format submissions accompanied by complementary reference from local citizens. What we propose is documented program submissions prepared as the result of assiduous planning and consultation covering two main areas: first, a canvass of the listening public who will receive the signal and who constitute a definite public interest figure; second, consultation with leaders in community life — public officials, educators, religious, the entertainment media, agriculture, business, labor — professional and eleemosynary organizations, and others who bespeak the interests which make up the community."

(Emphasis supplied).

5. While Reverend Autenrieth contacted a substantial number of local citizens on behalf of the Church, there is little in the record to support a position that he made any concerted analysis of the public needs respecting the proposed station.

It is clear that Autenrieth as head of his church had a pre-conceived idea as to the type of programming he desired to produce on the Church station. He has had some experience as a broadcaster and was conversant to a limited degree regarding the adaptability of an FM station to St. Louis. His personal acquaintances undoubtedly gave him some insight as to certain needs from a local viewpoint. However, the contacts which Autenrieth made for the most part were twofold; first, to enlist concurrence in his previously formulated program planning, and

second, to discuss the functioning of an FM station from an operational standpoint. The efforts and time devoted to planning by Reverends Maxey and Hebblethwaite were negligible. It is of course evident that all three clergymen were readily conversant about religious programming, which comprises 20.5% of the proposed Church programming. The Church did designate a program advisory committee which apparently has not functioned to any extent as it was selected only a short time in advance of the public hearing.

6. On the other hand, the record is silent as to any planning that Milam did prior to filing his original application in October 1963. Milam relies principally upon his experience in operating a Seattle, Washington, station for two years as the basis for programming in St. Louis. However, the evidence does not point up any connection between the actual performance of Station KRAB in Seattle and the Partnership proposal in St. Louis. It is sheer fanciful thinking for the Partnership to endeavor to transplant the Seattle operation to the St. Louis area as the appropriate method to meet the public interest. Lansman, while he visited St. Louis in 1961 and 1963 after having lived there as a child, produced no concrete support respecting planning on those indefinite visits to St. Louis. To be sure, Lansman did a few weeks prior to the evidentiary hearing in 1964 make a return trip to St. Louis and explored the possibility of programming for the M and L proposal. The effect of this could only be to "shore up" the M and L case as it pertains to programming.^{11/} It can hardly be said that Lansman's 1964 trip to St. Louis had any relationship to planning when the proceeding was nearing the hearing stage.

Proposed Programming:

7. Neither of the programming proposals offered by the applicants is particularly impressive. The Partnership contemplates 102-1/2 hours of weekly programming, while the Church proposes a

^{11/} See footnote No. 5, supra.

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total of 126 hours. The bulk of the M and L programming, representing 82.2%, will be devoted to entertainment, which will be largely music. Much testimony was offered by both of the partners relative to their tastes respecting entertainment, and more particularly music. The record does not reflect through any competent evidence that their tastes or desires are peculiarly adaptable to the needs of the St. Louis public which they here seek to serve. Milam is virtually a total stranger to St. Louis and Lansman's interest has been sparked simply by a few visits after he departed from that city when a child of 15 years of age. To ameliorate the M and L position respecting programming, the partners frequently referred in their testimony to the performance of Station KRAB, Seattle. Milam is, and has been, the main strength in the financial and operational aspects of Station KRAB since it went on the air in December 1962. While Station KRAB conceivably may be serving the needs of its Seattle audience, the record in this proceeding does not show to any degree that the needs of the St. Louis listening public will be filled by duplication of the programming of a station in another city. To a great extent, what the Partnership proposes here for its St. Louis station is to copy the Seattle station format.

8. By comparison, the Church proposes that 42.2% of its programming will be entertainment, while 20.5% is made up of religious programming. The entertainment programming of the Church proposal, as does the M and L proposal, largely embodies music. The Partnership offers religious programming to the extent of 6.1%. News programming represents 5.3% of the Partnership proposal but its plans do not contemplate a wire news service. On the other hand, the Church proposes 13.9% of news, which includes a wire news service. Educational programming included in the Church program will be 9.3%; whereas, educational programming contemplated by M and L is a mere 2.5%. The foregoing means that roughly 30% of the total program for the Church

will be religious and educational, which of course reflects the planning of the three clergymen-educators who are the directors of the Church group. By comparison, M and L only proposes a total of religious and educational programming to the extent of slightly less than 9%. The Church proposes more agricultural programming than does the other applicant, while the Partnership proposal has more in the way of talk and discussion programming than does the Church. By comparing the two programming proposals, only a slight preference can be accorded the Church and this is predicated largely on the fact that it will produce 23-1/2 more hours of programming weekly than M and L.

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Local Ownership:

9. The Church station will be locally owned. The Church is a Missouri corporation with a church and three schools in St. Louis. The three Church directors are all residents of St. Louis and have been so for many years. Reverend Autenrieth has lived in the city since he was 18 years of age and has been head of the Church group since its incorporation in 1946. He has been minister of his church, superintendent of three Christian Fundamental Schools, and the record is replete of his activities in various civic, temperance and evangelical organizations throughout the city over a span of years. He has also done a considerable amount of broadcasting from St. Louis and nearby radio stations. His contacts with citizens of St. Louis have been on a day-to-day basis for many years. The other two clergymen-educators have lived in St. Louis in recent years and to a considerably lesser degree than Autenrieth have participated in church and school enterprises and functions.

10. As for the other applicant, Lorenzo W. Milam has never lived in St. Louis and does not propose to do so in the event the application of Milam and Lansman is granted. Jeremy D. Lansman lived in St. Louis as a child but moved to San Francisco when he was 15 years

of age. He is not now a resident of St. Louis. He made brief visits to St. Louis in 1961 and 1963 after Milam had filed his application for the FM facility. In 1964 shortly before the commencement of the evidentiary hearing, Lansman went to St. Louis and spent part of two months studying program source material and program needs for the city. At that time he made a substantial number of contacts personally, by telephone and through a questionnaire to a number of people. He also purchased an interest in a bookstore in St. Louis in the fall of 1964. As observed above, Lansman was temporarily living in Washington, D.C., when the evidentiary hearing was in progress. As to the question of residence, it must be resolved in favor of Christian Fundamental Church.

Staffing, Studio and Equipment:

11. The staffing proposals of both applicants are somewhat similar, although the Church staff would be larger, including the part-time services of Autenrieth, Hebblethwaite and Maxey. However, this factor would be offset as Lansman would be on a full-time basis as the general manager and chief engineer for the Partnership staff. The Church did not disclose on the record the various types of equipment it proposed to use in its studios. It dealt only in generalities. Therefore, as to the facilities, the

record reflects that Milam and Lansman have made a better showing as to the planning concerning their facilities, and, when considered all-and-all, the Partnership must be given a moderate preference on this aspect of the two proposals.

Diversification of the Ownership of Mass Communications:

12. A slight preference in the comparative area of diversification of control of mass media may be accorded the Church. Neither the Church nor any of its principals has any interest whatsoever in any

media of mass communications. The same is true of the Partnership. However, Milam is a trustee of the licensee of Station KRAB in Seattle and contributes time and money to its support. Respecting integration of ownership and management, the three directors of the Church will be active in the participation and management of the station. The Church will have complete integration of ownership and management. As to the Partnership, Lansman will devote his entire time to the management of its proposed station. However, Milam will not live in St. Louis and will not be active in the daily management of the station.

Broadcast Experience:

13. The principals of the Partnership are entitled to a decided preference in broadcasting experience over the directors of the Church. This is readily discernible from the record of the five individuals here involved. Milam has established and operated an FM station for two years either through a sole proprietorship or a trusteeship. He has been the moving force at all times of Station KRAB. In addition, he has had limited experience at other stations, including work at radio stations when he was a university student. Despite his youth, Lansman has had as the record discloses considerable experience in the broadcast field. His interest in radio began when he was a child and has been his financial support since 1961. On the other hand, two of the principals of the Church, namely Reverends Hebblethwaite and Maxey together have had little actual experience in broadcasting. The activities of Reverend Autenrieth in the broadcast field have been confined primarily to the broadcasting of his temperance programs and church services. No evidence has been offered that any of the three Church directors have had any experience in operating a radio facility.

Summation:

14. In view of the foregoing Findings of Fact and Conclusions of Law and upon careful evaluation and consideration of the entire record in this proceeding, it is concluded that a grant

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of the application of Christian Fundamental Church for construction permit for Class B FM station in St. Louis, Missouri, to operate on 120.5 mc/s (Channel 273) with effective radiated power of 62.3 kilowatts and an antenna height of 382 feet above average terrain would better serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, this 12th day of April 1965, that unless an appeal to the Commission from this Initial Decision is taken by any of the parties or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Christian Fundamental Church for a construction permit for Class B FM station in St. Louis, Missouri, to operate on 120.5 mc/s (Channel 273) with effective radiated power of 62.3 kilowatts and an antenna height of 382 feet above average terrain IS GRANTED; and, the application of Lorenzo W. Milam & Jeremy D. Lansman, a Partnership, for a construction permit for Class B FM station in St. Louis, Missouri, to operate on 102.5 mc/s (Channel 273) with effective radiated power of 29.2 kilowatts and an antenna height of 423 feet above average terrain IS DENIED.

[SEAL]

/s/ Jay A. Kyle
Hearing Examiner
Federal Communications Commission

Released: April 12, 1965 and effective 50 days thereafter, subject to the provisions of the Rule [1.276] cited in the ordering clause above. Exceptions, if any, must be filed within 30 days of the release date unless an extension is duly granted.

[Signed & Mailed -April 13, 1965]

[RETURN RECEIPT REQUESTED
FEE PAID]

[CERTIFIED MAIL
NO. 97367]

[535]

66461

ERRATA

The Initial Decision released this date in the above-entitled proceeding (FCC 65D-14) IS CORRECTED as follows:

Page 27, line 7 of the ordering clause should read "102.5," in lieu of "120.5."

[SEAL]

/s/ Jay A. Kyle
Hearing Examiner
Federal Communications Commission

Dated: April 12, 1965

Released: April 13, 1965

[Signed & Mailed - April 13, 1965]

[CERTIFIED MAIL
NO. 97373]

[SPECIAL DELIVERY]

[RETURN RECEIPT REQUESTED
FEE PAID]

[649]

[Released: April 6, 1966]

FCC 66R-135
82379

DECISION

By the Review Board: Berkemeyer and Pincock. Board Member Nelson dissenting with statement.

1. The above-captioned applications of Milam & Lansman and Christian Fundamental Church are mutually exclusive in that each seeks a permit for a new FM station in St. Louis on the same frequency (102.5 Mc/s, Channel 273). Hearing was had before Examiner Jay A. Kyle on (a) a comparative coverage issue; (b) the standard comparative issue; (c) a site-availability issue as to Milam & Lansman; and (d) the ultimate issue as to which application should be granted. The Examiner

concluded that Milam & Lansman had met their burden of proof under the site-availability issue, and went on to consider the applications under the comparative issues. The latter he resolved in favor of Church and, accordingly, his recommendation is that Church's application be granted and the other denied. ^{1/}

2. Oral argument on the applicants' exceptions was held before a panel of the Review Board on December 17, 1965. In brief, the Milam & Lansman position is that the Examiner was correct with respect to site-availability; and further that Church is entitled to no more than a "tiny coverage preference", and the partnership "will bring to St. Louis a superior program service, provided by better qualified persons, who are more to be relied upon to carry out their proposals than the Church group." Church argues not only that the Examiner was correct as to the

^{1/} The Examiner's Initial Decision was released on April 12, 1965 (FCC 65D-14).

comparative aspects of the case, but also that such aspects are moot by reason of a failure by Milam & Lansman to carry its burden under the site issue. The Board agrees with Church that Milam & Lansman have failed to demonstrate reasonable assurance as to the availability of its proposed antenna site; that the partnership's failure in the foregoing respect leaves its proposal on a site-to-be-determined basis; and that, accordingly, its application must be denied for want of basic qualifications. ^{2/} Since Church has been held to possess all requisite qualifications, and since there otherwise exist no impediments to a grant, that applicant is entitled to an award herein. Accordingly, the ultimate result of the Initial Decision, namely, that Church be granted and Milam & Lansman denied, is hereby sustained. ^{3/}

3. The site issue as added to the Commission's original issues by Review Board order of January 18, 1965 (FCC 65R-20) granting a

Bureau petition of December 7, 1964.^{4/} The Milam & Lansman application proposed an antenna site atop the Continental Building, owned by Harold Koplar, A. J. Cervantes and Morris Shenker, d/b/a Harold Koplar and Associates. In one portion of its engineering material, Milam "proposed to install a guyed tower of 116 feet at the present location of the 56 foot tower in use by KADI-FM, . . . KADI-FM to remain at its present location." However, in

^{2/} See Amendment of Part 3, Docket No. 10572, FCC 53-1419, 18 F.R. 6968, pet. for partial recon., denied, 10 R.R. 1528.

^{3/} Rulings on the exceptions will be found in the appendix hereto. The Broadcast Bureau, which participated in the hearing, neither filed exceptions nor appeared at oral argument. In lieu of such an appearance, it filed a statement endorsing the conclusion with respect to the site-availability issue, and taking no position on the comparative aspects of the proceeding.

^{4/} The Review Board had earlier denied a Church petition (filed September 28, 1964) for the issue as procedurally and substantively defective (FCC 64R-561, released December 16, 1964). By Order released February 8, 1965 (FCC 65R-54), the Board dismissed as moot a second Church request (filed December 22, 1964) for the issue; the same order denied as substantively deficient a Church request for a misrepresentation issue as to Milam & Lansman.

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an FAA form included in the material, Milam & Lansman indicated that the existing tower structure utilized by KADI-FM would be increased by 60 feet. To the Bureau petition of December 7, 1964 was attached a statement by Thelma M. Tucker, manager and rental agent for the Continental Building. The statement was to the effect that, as of December 2, 1964, Milam & Lansman had no commitment from or agreement with the management of the Continental Building for the use of the building as an antenna site, and that she did

" . . . not have the authority to grant such permission — such construction could not be authorized to any one without appropriate sketches and engineering data"

Because extensive alterations appeared to be required, and because Milam & Lansman had not demonstrated that the necessary construction would be approved, the Board added the issue. In so ordering, the Board stated as follows (citations and footnote omitted):

"6. The Board's opinion, in this regard, does not mean that a binding arrangement is needed to demonstrate site availability. Commission requirements are satisfied when an applicant proposes a site with reasonable assurance in good faith that the site will be available for the intended purpose. Because of the extensive alterations which Milam & Lansman propose to make on the roof, together with the fact that approval of the plans is a prerequisite to the use of the roof, and since it is not clear that the roof of the Continental Building is available to Milam & Lansman, Milam and Lansman have not demonstrated satisfactorily that there is reasonable assurance of the approval of said construction, and an issue will therefore be added to determine the availability of the specified site for the use proposed. The Board's disposition of the Bureau's motion does not, however, comprehend a determination of the suitability of the proposed site and the Board notes the absence of any actual allegations concerning such a question."

4. The hearing with respect to the added issue was conducted on February 11, 1965, and Miss Tucker was the only witness called by Milam & Lansman. Through her, Milam & Lansman introduced a "Lease Option Agreement" of February 10, 1965 (Milam & Lansman Exhibit 16), granting Milam & Lansman an option to lease (on the Continental Building) "certain radio tower facilities . . . for installation and operation of radio, tower, transmission and antenna equipment", the use to "conform to all necessary governmental laws and regulations, and [to] not abridge prior rights of other lessees." The agreement was signed in the name of "Harold Koplar

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& Associates" by Miss Tucker. Miss Tucker testified that although she had no written authority to sign agreements on behalf of the building owners (Tr. 567), she had authority under the "real estate laws of Missouri" — "I represent them, and they are responsible for any of my signatures." (Tr. 566) She further testified that she has signed written agreements for the owners in the past (Tr. 567), such written agreements being only "lease option agreements", and not "lease agreements." (Tr. 568) She also stated (Tr. 569): "I have worked for Mr. Koplar for about 15 or 18 years, and he just lets me do what I want to do."

5. She testified that on the previous day (when the agreement was signed) she had received some sketches of the Milam & Lansman tower. (Tr. 557-59, 571) Bureau counsel (but not, apparently, Church's counsel) ^{5/} was permitted to examine the sketches "to compare the sketches with the sketches contained in the application filed by Milam and Lansman." (Tr. 557-59) When Church attempted to explore the question of possible variance and the nature of the sketches, Milam & Lansman continually objected on the ground that the questions went to "suitability" and not "availability"; at Tr. 571 and 577, the objections were sustained. ^{6/}

^{5/} The following is from Tr. 583:

"Mr. Daly: Now I want to ask a series of questions having to do with the sketches and ask to be shown the sketches. Now may I go into that?"

"Mr. Bader: Mr. Examiner, I will object to that."

"Presiding Examiner: We are not going to interrogate this witness about something that is not in this record. That goes to the application and the sketches. Neither are a part of this record, and we are not going to engage in speculation as to what or what might not be on something that is not in this record."

6/ At Tr. 583-90, Church requested the Examiner to take official notice of specified engineering material in the Milam & Lansman application, but was refused on grounds of irrelevancy and immateriality. Church then attempted (Tr. 593) an offer of proof in the foregoing respect. The offer was at first "overruled", on grounds that the offer related to matters "not in this record". (Tr. 595) At Tr. 598, however, the Examiner "lean[ed] over backwards", and allowed the offer; whereupon (at Tr. 599), the offer was stated as follows:

"Mr. Sharp. The engineer for Milam and Lansman. In the application for Milam and Lansman, he shows that there would be a guyed tower built to support an antenna for his FM station, or for the Milam and Lansman FM station. If I were allowed to show that, and if I were allowed to get the answer from Miss Tucker with respect to the construction of this particular tower, I would then show that there is a variance, because Milam and Lansman have not shown Mrs. Tucker that which they have said they were going to build in their application."

(Footnote continued on next page.)

It was elicited, however, (Tr. 578) that Miss Tucker "would have to have further authority" from the "owners of the building" "to put the tower on the roof." 7/ She does not know whether a building permit would be necessary (Tr. 560, 579), and she was not familiar with zoning regulations (Tr. 560). At Tr. 580-82, Church attempted "to show the impossibility of getting a permit to extend the . . ." On objections by Milam & Lansman, the Examiner refused permission, since: "That goes to suitability; yes, sir. Sustained." At Tr. 590-93, Church sought to get into the question of whether existing permittees or licensees having antenna facilities on the roof would have rights (under their leases) to object to the Milam & Lansman proposal, but objections by Milam & Lansman were again sustained.

6. In his Conclusions (par. 2) the Examiner stated that "the only conclusion that can be drawn from the evidence of this case is that the 'Added Issue' must be resolved in favor of M and L." Of primary

persuasion to the Examiner appears to have been the lease-option agreement itself, and Miss Tucker's testimony that Mr. Koplar lets her do what she wants to do and the owners of the building are responsible for her signatures. (See par. 4, supra.) The Examiner's last finding in par. 43 of his Findings of Fact — that Miss Tucker "concluded that her principal stood ready to carry out the terms of the lease agreement in the event its terms are consummated" — has (so far as the Board can determine) no direct support in the record, and apparently represents the Examiner's interpretation of Miss Tucker's testimony. In both the findings and conclusions, the Examiner recited that Church also proposes to locate its antenna on the Continental Building. But this fact is not in the least persuasive, since Church does not propose additional construction, but would merely side-mount a 70-foot antenna on the existing tower, the top of the antenna to extend 34 feet above the tower.

6/ (Continued:)

Notwithstanding the Tucker testimony at Tr. 604 (see note 7, below) and notwithstanding the terms of the agreement — which speak in terms of leasing an existing tower — there is no certainty as to whether Milam & Lansman intends to use the existing tower, or to construct a new, 116-foot tower either at that location or elsewhere on the roof. The record is unclear as to what was shown Miss Tucker; and that the sketches may have contemplated something more than an extension on the existing tower finds support not only in the Milam & Lansman application (see par. 3, supra), but also at Tr. 561-62, where Miss Tucker testified that the KADI-FM antenna was "Not on the same side, exactly, physically, that these two, that Milam and Lansman and Christian Fundamental are asking for, no."

7/ And see Tr. 604, where Miss Tucket testified: "The additional part of the existing tower will be the responsibility of the lessee. If it is — if it can be constructed." (Emphasis added.)

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7. What is missed in the Initial Decision is that the Milam & Lansman antenna proposal stands precisely as it did when the Board added the site issue in January, 1965. At that time (a) it appeared that extensive alterations were required on the roof in connection with either (1) the dismantling of an existing tower and the erection and guying of a new one, or (2) a 60-foot addition, with guying, ^{8/} to the existing tower; (b) authority to effect the required alterations had not been secured; and (c) such authority could not be granted by the building's rental agent (Miss Tucker). In attempting to meet its burden of establishing reasonable assurance of site-availability, Milam & Lansman has relied on the lease-option agreement of February 10, 1965. That agreement started out impressively enough, but Miss Tucker's testimony soon reduced it to a meaningless document in terms of satisfying the added issue. ^{9/} Thus, Miss Tucker still does not have authority to approve alterations to the roof, such authority continuing to repose in the owners of the building. Accordingly, the lease-option agreement, as clarified and explained by Miss Tucker, confers (for purposes of the issue) no more than a right to seek approval of construction plans from the building's owners — a right which Milam & Lansman has possessed from the beginning. ^{10/}

^{8/} The Milam & Lansman application (Section V-G, par. 5) specifies a "guyed tower", as does the engineer's affidavit contained in the application; additionally, Figure 2 of the affidavit depicts a guyed tower. Official notice is taken of the foregoing data.

^{9/} If anything it increased Milam & Lansman's problems, since it raised the new questions of whether existing broadcast lessees on the roof could prevent the installation of Milam & Lansman's antenna, and whether a building permit could be secured. In the latter connection, if a building permit were refused, the site proposed would not be available to Milam & Lansman; and the Examiner's rulings, which were, in effect, that Church's questions in this area went only to suitability were clearly erroneous.

^{10/} Again, were the owners to withhold approval, the site would not be available.

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8. Nor can it be argued that Milam & Lansman had a right to rely on "apparent authority" in Miss Tucker (as rental agent for the building) to approve the alterations and construction contemplated by the partners, ^{11/} so as to demonstrate on their part "reasonable assurance in good faith" ^{12/} that the lease-option agreement would satisfy Commission requirements. With Miss Tucker specifically disclaiming (in her statement of December 2, 1964 — see par. 3, supra) authority to approve construction or alterations on the roof, it was patently unreasonable for the partners to deal with anyone other than those possessed of the authority to approve the plans. ^{13/} In this connection, there has been no contention that the owners were inaccessible, and Mr. Lansman, in an affidavit of December 15, 1964, admitted that he had been in contact with Mr. Cervantes, one of the owners. See the Board's order of January 18, 1965 (supra, par. 3), par. 4.

9. For the above reasons it is the Board's judgment that Milam & Lansman has failed in its burden of proof with respect to the site-availability issue, and that its application must be denied for want of basic qualifications. This judgment renders moot the comparative aspects of the case, and dictates a grant of Church's application. See par. 2, supra.

Accordingly, IT IS ORDERED, This 4th day of April, 1966, That the application of Christian Fundamental Church for a construction permit for a new Class B FM station on Channel 273 (102.5 Mc/s) in St. Louis, Missouri (BPH-4402), IS GRANTED; and that the application of Lorenzo W. Milam & Jeremy D. Lansman, a Partnership, for the same permit (BPH-4218), IS DENIED.

[SEAL]

/s/ Donald J. Berkemeyer
Member, Review Board
Federal Communications Commission

Attachment

Released: April 6, 1966

[Signed & Mailed -April 6, 1966]

*See attached Dissenting Statement of Board Member Nelson

11/ What is specifically contemplated by them remains in doubt. See note 6, supra. The sketches submitted to Miss Tucker might have provided clarification in this respect; unfortunately, they were not made a part of the record, nor even made available to the opposing applicant. Perhaps Bureau counsel satisfied himself that there was no variance from material in the application; but from which of the two proposals (see par. 3, supra) was there no variance?

12/ See the quotation from the Board's order at par. 3, supra.

13/ There is no suggestion on the record that the sketches were submitted to Miss Tucker with a view to having them forwarded to those in authority, and the eleventh-hour delivery of the sketches to Miss Tucker appears to establish a lack of any such intent.

APPENDIX

Rulings on Exceptions

All of the exceptions filed by Milam & Lansman are denied, 1-29 and C1-C9 as moot, and C10 for the reasons stated in the whole of the Decision. Of the exceptions filed by Christian Fundamental Church, 2-9 and 14-22 are denied as moot, and the remainder are disposed of as follows:

- 1 - Granted in substance; see Decision, pars. 3 and 6 and note 6 (par. 5).
 - 10 - Denied, although the Board agrees that the exhibit was meaningless in terms of satisfying the added issue; see Decision, par. 7.
 - 11 - Granted; each of the rulings complained of was erroneous.
 - 12 - Granted in substance; see Decision, pars. 3-5.
 - 13 - Granted in substance; see Decision, pars. 7-8.
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DISSENTING STATEMENT OF BOARD MEMBER
JOSEPH N. NELSON

I dissent. The majority seeks to disqualify Milan and Lansman for failure to satisfy a burden never before imposed under the site availability issue. In so doing it has misconstrued its own Memorandum Opinion and Order adding the issue $\frac{1}{2}$ and has overlooked a long line of Commission precedents. It is noteworthy that the majority has cited not one precedent in support of its Decision. The majority appears to base its disqualification of Milam and Lansman's proposal on its conclusions that Milam and Lansman have not specified whether they propose to modify the existing radio tower or replace it; that tower alteration plans could not have been submitted to the building "owners"; and that Miss Tucker, the rental agent, has no authority to approve alterations on the roof. These conclusions, each of which I believe to be unwarranted, are accompanied by several other observations which appear to be of some significance to the majority and with which I also disagree.

Contrary to the majority's assertion in paragraphs 3 and 7 of the Decision, there is no doubt but that Milam and Lansman propose to extend the existing tower on the roof of the Continental Building and to place their antenna thereon; they do not intend to construct a new one. Nevertheless, the majority professes "doubt" as to what Milam and Lansman propose on the basis of an affidavit signed by Milam and Lansman's consulting engineer on October 23, 1963, in which the following statement appears:

That Figure 2 of this statement [an engineering statement submitted as part of the application] is a vertical plan of the proposed installation, and that it is proposed to install a guyed tower of 116 feet at the present location of the 56 foot tower in use by KADI-FM, . . . permitting the Collins 37M5 antenna of KADI-FM to remain at its present location.
(Emphasis added.)

I construe this statement to evidence Milam and Lansman's intention to extend the existing tower; this construction is consistent with every other representation made throughout the engineering presentation in their application. See Section V-G of Form 301 and FAA Form 117 signed on the same date. It is unfortunate that the majority has chosen to elevate a semantic oversight to the level of probative evidence and continually raises the specter of a possible "variance" throughout its opinion.

In adding the site availability issue the Board expressed its concern with the absence of reasonable assurance that the "management of

^{1/} FCC 65R-20, released January 18, 1965.

the Continental Building" ^{2/} would permit Milam and Lansman to use the proposed antenna site and extend the existing tower:

In the opposition, itself, it is shown that the partnership does not now have an agreement or commitment for the proposed site and that such commitment requires the submission and approval of engineering plans relative to the partnership's anticipated construction. Since Milam and Lansman have not submitted such plans and since the right to use the proposed site depends upon the approval of such plans by the management of the Continental Building, the Board is unable to find even reasonable assurance of the availability of the antenna site proposed by the partnership.

[Footnote omitted.]

In its Memorandum Opinion and Order, the Board specified the standard of proof which Milam and Lansman would be expected to meet. That standard contemplated approval of Milam and Lansman's plans by the "management" (not owners) of the Continental Building as a "pre-requisite to the use of the roof;" that is, as a prerequisite to an

agreement or commitment for use of the roof. Contrary to the majority's suggestion at footnotes 6 and 11 of the Decision, the Board's Opinion cannot be interpreted as requiring Milam and Lansman to submit their tower alteration plans to the Commission.^{3/} The majority suggests that in adding a site availability issue the Board was primarily concerned with the extent of the contemplated alterations. This is erroneous.^{4/} At the time the site availability issue was added, the Board was concerned with reasonable assurance that the site would be available, not with some hypothetical eventualities which the majority now apparently fears might at some future time frustrate the existing agreement between Milam and Lansman and the management of the Continental Building.

To evidence "reasonable assurance" Milam and Lansman submitted a lease option agreement which admittedly was given them after satisfaction of the condition precedent — submission of the tower alteration sketches

^{2/} The majority has misinterpreted the Board's requirement of approval "of the management of the Continental Building" to mean "owners". The majority then proceeds on the basis of its erroneous interpretation for the remainder of its opinion.

^{3/} The majority notes (footnote 2 and paragraph 5 at footnote 5) that (a) the Bureau examined the sketches with a view to determine if there were a variance from the engineering portion of Milam and Lansman's application and (b) on the basis of its examination the Bureau recommended a favorable finding on the site availability issue and affirmatively supported the Examiner's conclusion on appeal.

^{4/} The Board's concern with the alterations was an ancillary matter predicated on Miss Tucker's representation that no agreement or commitment would be given by the building management before satisfaction of the condition precedent — submission of sketches and data.

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to the management. Faced with Miss Tucker's sworn statement that she had authority to sign lease-option agreements, has done so in the past, and did so here, the Board cannot conclude other than that Milam and Lansman have satisfied the burden imposed by the Board when it added the issue, i.e., to provide reasonable assurance that the site would be available for its proposed use. Contrary to the majority's assertion in paragraph 7 of its Decision, Milam and Lansman's antenna proposal does not stand as it did when the Board added the issue. There is no question but that Milam and Lansman propose to extend the existing tower, that the management of the Continental Building has received the appropriate sketches and that, based on its satisfaction with those sketches, the management has entered into a lease-option agreement with Milam and Lansman.^{5/} However, the majority has now apparently concluded that it must have not just "reasonable assurance", it must have certainty. Thus, the majority attacks not the lease-option agreement, but Miss Tucker's authority to actually authorize construction. This is not the authority with which the Commission need be concerned. Miss Tucker is the authorized agent of the building owners and Milam and Lansman have every right to rely upon her representations. There is absolutely no record basis for the majority's innuendo that Milam and Lansman somehow lacked good faith.

The majority (paragraph 3 of the Decision) acknowledges that the issue herein was specifically limited to "availability of site", not "suitability of site". However, after noting this distinction, the majority proceeds to reason that if a site is not suitable it is not available. (See footnotes 9 and 10 of the Decision.) Under the majority's reasoning there is no distinction between site suitability and site availability; site availability per force includes all questions of suitability. This is a novel theory and unfounded in light of prior cases in which separate site availability and site suitability issues have been considered by the Board. See, e.g., D & E Broadcasting Co., FCC 63R-95, released

February 27, 1963; Edina Corp., FCC 62R-82, 24 RR 455. These cases make it clear that site availability and site suitability are completely separate concepts ^{6/} and, even assuming that the facts herein raise a question of site suitability, Milam and Lansman not only have had no notice prior to this decision that suitability is a problem, but they have in fact been affirmatively led to believe that suitability was not

^{5/} Even Church's counsel conceded at oral argument that under the lease-option agreement Milam and Lansman "could put all the facilities of Radio Free Europe on top of that tower. . . ." (Tr. 640)

^{6/} The difference, it seems to me, is a fairly elementary one and I have some difficulty with the majority's failure to appreciate it. If there is a question whether an applicant can build a radio tower on his specified site (either for lack of possession or authority such as zoning), that is a question of availability. If the specified site is available, i.e., owned or leased or otherwise legally "occupied" by the applicant and properly zoned, but there is a question whether the particular antenna can be constructed on the site, that is a question of suitability.

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in issue. I believe that the Board's failure to give Milam and Lansman clear notice that suitability is in issue is inconsistent with the requirements of Section 5(a) of the Administrative Procedure Act.

Despite the fact that the Board limited the issue to availability of site and nowhere raised a question whether a building permit could be obtained, the majority would apparently now have Milam and Lansman prove that a building permit for the proposed alteration will not be refused, even though there is not one scintilla of evidence ^{7/} that such authorization would be refused. The majority's approach is contrary to the Commission's long-established proposition that compliance with local ordinances and zoning regulations is essentially a matter of local concern and absent specific allegations to the contrary the Commission assumes local approval. See Lebanon Valley Radio, FCC 65R-164, 5 RR 2d 65; Chronicle Publishing Company (KRON-TV), FCC 64R-309,

3 RR 2d 529, review denied FCC 65-98, released February 11, 1965; Eastside Broadcasting Company, FCC 63R-528, 1 RR 2d 763; Edina Corp., FCC 63R-77, released February 16, 1963; W. Gordon Allen, 13 RR 1120 (1956); and Indianapolis Broadcasting, 10 RR 1010c (1954).

Nowhere does the majority explain what it would have Milam and Lansman present to satisfy their burden of proof. However, it appears the majority now also demands that Milam and Lansman prove that no "existing broadcast lessee on the roof could prevent installation of Milam and Lansman's antenna." This requirement overlooks the explicit provision of the lease-option agreement that Milam and Lansman's use of the roof may not abridge any prior rights of other lessees and the absence of any showing that Milam and Lansman's proposal would violate any such prior rights.^{8/} Even assuming that the majority is correctly concerned with unspecified rights of persons not party to this proceeding, and that such persons have not been satisfactorily protected by the express terms of the lease-option agreement, surely Milam and Lansman were at least entitled to prior notice of this concern. Moreover, the Commission has indicated that interpretation of a clause of a lease is properly left to be decided by local courts. Queen City Broadcasting Company, FCC 61-402, 21 RR 472b.

The majority, at paragraph 2 of the Decision, has denied the Milam and Lansman application "for want of basic qualification" grounded on the Commission's Report and Order^{9/} amending Section 73.33 of the Rules to require that applicants specify a definite antenna site and precluding the grant of applications on a "site-to-be-determined" basis. However, the

^{7/} Unless the self-serving, unsubstantiated, bare statement of Church's counsel can be considered "evidence".

^{8/} The only other lessee mentioned was KADI-FM, which, Miss Tucker testified, had broken its lease prior to the hearing for non-payment of rent. Commission records indicate that KADI-FM was silent from February 14, 1964 until February 18, 1966, when an assignment of the station license was consummated.

^{9/} Amendment of Part 3, Docket No. 10572, FCC 63-1419, 18 F.R. 6968, petition for partial reconsideration denied 10 RR 1528.

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majority fails to note the Commission's rationale in promulgating the amended rules: "(1) to reduce the unnecessary additional workload imposed upon the Commission [by the site-to-be-determined procedure] . . .; and (2) to eliminate the uncertainties inherent in the original grant when the site-to-be-determined application is employed." This rationale demonstrates that the Commission's primary concern was to avoid uncertainties as to the coverage and interference aspects of "site-to-be-determined" applications. In the instant case there is no question but that Milam and Lansman's entire presentation under the coverage issue is predicated on the antenna location they have specified from the inception of this proceeding. The "evil" the Commission sought to avoid in amending Section 73.33 is simply not present in this case.

The majority has misconstrued the Commission's intent in amending Section 73.33, the Board's intent in adding the site availability issue, the evidence of record and past Commission precedent. I disagree with the majority's ultimate conclusion both as a general proposition of law and as applied to the particular facts of this case and I would therefore decide the site availability issue favorably to Milam and Lansman. While the majority did not reach the standard comparative issue, I would reach that issue and prefer the Milam and Lansman proposal to that of Christian Fundamental Church.

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ERRATUM

By the Review Board:

The last sentence quoted in paragraph 3 of the Decision of the Review Board in this proceeding, FCC 66R-135, released April 6, 1966, is hereby corrected to read as follows:

The Board's disposition of the Bureau's motion does not, however, comprehend a determination of the suitability of the proposed antenna site and the Board notes the absence of any factual allegations concerning such a question.

[footnote omitted]

FEDERAL COMMUNICATIONS
COMMISSION

[SEAL]

/s/ Ben F. Waple
Secretary

Released: April 8, 1966

[Signed & Mailed -April 8, 1966]

[664]

[Rec'd-FCC-May 6, 1966]

LAW OFFICES
HALEY, BADER & POTTS
* * * Fifth Floor, Broadcasting-Telecasting Building * * *
1735 De Sales Street, N. W.
WASHINGTON, D. C. 20036

May 6, 1966

Mr. Ben F. Waple, Secretary
Federal Communications Commission
Washington, D. C. 20554

Dear Waple:

We transmit herewith the original and fourteen copies of "Motion for Extension of Time" which is being filed for Lorenzo W. Milam and Jeremy D. Lansman in FCC Dockets 15615 and 15617.

If there are any questions concerning this matter, kindly communicate directly with this office.

Very truly yours,

/s/ Andrew G. Haley

Enclosure

[Rec'd-FCC-May 6, 1966]

MOTION FOR EXTENSION OF TIME

Lorenzo W. Milam and Jeremy D. Lansman, a partnership, by their attorneys, respectfully move for an extension of one week to and including May 13, 1966, of the time for filing their application for review of the decision of the Review Board in this proceeding. This Motion is filed pursuant to the provisions of Rule 0.371.

The application for review, which is due to be filed May 6, 1966, has not been completed by counsel for Milam and Lansman and approved by the partnership because of the following factors:

a. Counsel who tried the case has been out of his office and out of the City of Washington for extended periods subsequent to the issuance of the decision in this proceeding. Counsel participated in the deposition proceedings in Los Angeles, California, in Dockets 15752, etc., during this period and has otherwise been occupied with an exceptional amount of work which has precluded completion of the application for review.

b. One of the partners of the applicant was hospitalized during a portion of the time subsequent to the issuance of the decision.

The Chief, Broadcast Bureau, has consented to immediate consideration and grant of this motion. Counsel for the Christian Fundamental Church indicated that he would not file an objection to the grant of this motion.

In view of the foregoing, it is respectfully requested that the date for the filing of this application for review be extended one week to and including May 13, 1966.

Respectfully submitted,

LORENZO W. MILAM & JEREMY
D. LANSMAN, A PARTNERSHIP

1735 DeSales Street, N.W.
Washington, D.C. 20036

By Haley, Bader & Potts

/s/ Andrew G. Haley

/s/ Michael H. Bader
Its attorneys

May 6, 1966

[Certificate of Service]

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ORDER

FCC 66M-653
83771

The Commission having under consideration a motion for extension of time, filed May 6, 1966, by Lorenzo W. Milam and Jeremy D. Lansman, a partnership;

IT APPEARING, That petitioner seeks an extension of time to and including May 13, 1966, within which to file an application for review of the Review Board's Decision, (FCC 66R-135) released April 6, 1966, and that counsel for the other parties have indicated no objection to the grant of the instant request;

IT IS ORDERED, This 6th day of May, 1966, in accordance with the authority delegated to the Chief, Office of Opinions and Review pursuant to Section 0.371 of the Rules, that petitioner's request for an extension of time IS GRANTED, and the time within which to file an application for review IS EXTENDED to and including May 13, 1966.

FEDERAL COMMUNICATIONS COMMISSION

[SEAL]

/s/ Ben F. Waple
Secretary

Released: May 9, 1966

[Signed & Mailed -May 9, 1966]

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[Rec'd-FCC-May 13, 1966]

LAW OFFICES
HALEY, BADER & POTTS
* * * Fifth Floor, Broadcasting-Telecasting Building * * *
1735 De Sales Street, N. W.
WASHINGTON, D. C. 20036

May 13, 1966

Mr. Ben F. Waple, Secretary
Federal Communications Commission
Washington, D.C. 20554

Dear Mr. Waple:

We transmit herewith the original and nineteen copies of Application for Review to be filed in Dockets 15615 and 15617, on behalf of Lorenzo W. Milam and Jeremy D. Lansman, a partnership.

If there are any questions concerning this matter, kindly communicate directly with this office.

Very truly yours,

/s/ Andrew G. Haley

Enclosure

[669]

[Rec'd-FCC-May 13, 1966]

APPLICATION FOR REVIEW

Milam & Lansman, by their attorneys, respectfully file this application for review of the Decision of the Review Board, dated April 6, 1966, denying their application for a new FM station in St. Louis, Missouri, and granting the competing application of Christian Fundamental Church. [FCC 66R-135.]

The Board's action was taken by a two-to-one vote, with Member Nelson dissenting and voting to grant the Milam and Lansman application.

This application for review is presented under Subsections (i) and (iv) of Rule 1.115(b), and pursuant to an Order extending the filing date. FCC 66M-653, May 9, 1966. The factors which warrant Commission consideration are (a) conflict with case precedent and policy and (b) erroneous findings as to important and material questions of fact.

This is a comparative hearing involving substantial issues such as the Church's long time racial segregation policy, Milam and Lansman's distinguished broadcast record at station KRAB-FM in Seattle, Washington, Milam and Lansman's proposal for substantial integration of ownership and management, and the superior character of Milam and Lansman's programs. The majority ignored each of these matters in the Decision. It decided the case on the technical issue of the availability to Milam and Lansman of a site on the roof of the Continental Building in St. Louis. (The Church proposes the same site.) It said, in effect, that the Church can use the site but Milam and Lansman cannot.

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I. Questions Presented for Review

The Review Board denied (Concls. 1-9) the application of Milam & Lansman (referred to as M & L) solely because the two-Member

majority concluded that M & L had failed to meet their burden of proof with respect to an issue as to the availability of their antenna site on the roof of the Continental Building in St. Louis. Both applicants propose that site. The record shows (a) the site is eagerly offered to all FM applicants and stations in St. Louis by the building management and ownership (two stations are already authorized there) and (b) the building manager granted to M & L a lease option agreement to use the site, and so testified when the document was introduced in evidence [T. 555, 561]. In fact, even counsel for the Christian Fundamental Church said M & L can secure permission to use the site. At T. 536 he commented, "The issues go beyond, 'can Milam and Lansman get a site on the Continental Building?' They certainly can. We got ours. There is one up there already."

The first question presented for review, therefore, is whether the majority erred as to the facts and the law in deciding the site availability issue. (Concl. 1-9). As to the facts, the majority swept aside the sworn testimony of the building manager, the lease option agreement, the uncontradicted evidence that Milam and Lansman — like the Church — have all necessary authority to use the site, the position of the Broadcast Bureau and the Examiner's conclusion that M & L have proved site availability.

As to the law, the majority did not cite any cases in support of its decision, and previous site availability cases are directly in conflict with the decision. In his dissent, Member Nelson cited these cases. He pinpointed the majority's errors on page 5 of his dissent as follows: "The majority has misconstrued the Commission's intent in amending Section 73.33, the Board's intent in adding the site availability issue, the evidence of record and past Commission precedent.

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The second question presented for review is whether the Board's majority erred in concluding that the Church possesses all requisite qualifications, and that there are no other impediments to a grant of its application [Decision, page 2, paragraph 2]. Here, again, Member Nelson dissented, and voted to grant M & L. The evidence shows that the Church does not possess the fundamental qualifications to be a licensee, and the majority erred in not considering the comparative showings of the applicants. If it had done so, it would have had to come to grips with the lack of qualifications of the Church, particularly in view of the evidence of its past policy of racial segregation within the elementary and secondary schools operated by the Church, a policy which in practice continues to exist, even though it was ostensibly withdrawn on the eve of the hearing in this case. The majority has effectively precluded consideration of significant differences between the applicants as to their program proposals, their broadcast experience (M & L have extensive experience, the Church none), the extent to which the ownership will be integrated with the management of each proposed station and other public interest considerations of decisional significance.

II. The Factors Which Warrant Commission Consideration of the Questions Presented

The Commission should review the present case because the decision conflicts with case precedent and established Commission policy. As is shown in the Argument, infra, pages 6-15, the majority reached the conclusion that Milam and Lansman failed to show the availability of their site despite the unimpeached testimony of the manager of the Continental Building in St. Louis, Missouri, on which the site will be located, to the effect that a lease option has been granted in writing to Milam and Lansman for the installation of their antenna on the tower on the roof of the building. The lease option was received in evidence. The Broadcast Bureau and the Hearing Examiner were thereupon satisfied that M & L

had shown the availability of their site. The Church produced no contradictory

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evidence — in fact it did not call a single witness or offer any exhibits on the point.

What weakens the majority's decision in this case is that the same site is proposed by the other applicant, Christian Fundamental Church. Furthermore, the same site is sued for an existing FM station (KADI-FM, 96.5 mc), and the Commission's own files show that the same site is specified by an FM permittee in St. Louis (KACO, 107.7 mc). The record contains a thorough showing that the site is one which is eagerly offered to FM stations and applicants by the building ownership. It is "dedicated" to FM station operation. (The building manager testified: "The building has been examined, and there is room for several antennas on top of that building")(T. 561). On October 19, 1964, she had written M & L: "... we do have space available on our tower in the Continental Building for lease to any broadcasting-telecasting system for antennas and transmitters . . ." [Opposition To Motion To Enlarge Issues, December 15, 1964].

The Commission's policy is well stated in the Suburban Broadcasting Co., case as follows:

"We do not require an applicant to enter into a final binding arrangement in order to establish that a site is available to him." [Suburban B/cstng. Co., 19 Pike & Fischer RR 956a, 959]

and in Greater New Castle Broadcasting Corp., 8 Pike & Fischer RR 291, 319:

"... in the absence of evidence appearing upon a hearing record that a site . . . is not available . . . it must be necessarily presumed that the site specified will be available . . ."

M & L introduced a lease option agreement for their use of the site; they produced the building manager to testify that "this is a lease option I had drawn up yesterday for the tower of the Continental Building and an extension of the tower for the Continental Building" [T.555].

The Church produced no rebuttal testimony or exhibits.

Small wonder that the Bureau, which had petitioned originally for the addition of the site availability issue, concluded:

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"... M & L has reasonable assurance that the antenna site it proposed is available to it" [Bureau Fdgs, page 8.] and the Examiner so concluded [Initial Decision, page 21].

Finally, Commission consideration of the questions presented is warranted because the majority made erroneous findings as to important and material questions of fact. The Hearing Examiner, the Broadcast Bureau, and Milam and Lansman, have been in agreement on the issue of site availability since the conclusion of the hearing in this proceeding. Their agreement reflects the only rational finding which could be drawn on the basis of the evidence which shows that the building manager has granted to Milam and Lansman a lease option agreement for use of the site, the site is employed by other FM stations and is specified by other applicants, including the competing applicant in this proceeding. The majority's ultimate conclusion is based on erroneous determinations of questions of fact, specifically the incorrect and illogical interpretation placed on the lease option agreement and on the testimony of the building manager. Without question, the site is available to Milam and Lansman, and the majority's interpretation of the evidence amounts to an erroneous and prejudicial finding on what turned out to be the ultimate material question of fact in the decision.

III. The Respects in Which the Action Taken Should Be Changed

The Decision should be reversed, the Commission should apply its policy on site availability by determining that Milam and Lansman have met their burden of proof, and a decision granting the Milam and Lansman application should be entered.

IV. The Form of the Relief Sought

M & L respectfully request the Commission to vacate the decision, to reach the conclusion that Milam and Lansman have met their burden of proof with respect to the site availability issue, and upon consideration of the evidence on all of the material questions presented to the Commission, including the comparative qualifications of the applicants to serve the public interest, to grant the M & L application.

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In the alternative, it is requested that the decision on the site availability issue be vacated and that the proceeding be remanded to the Review Board for consideration of the comparative qualifications of the applicants.

V. Argument

A. Statement of the Facts

On November 12, 1963, an application for construction permit was filed by Lorenzo W. Milam. [The application was amended on March 13, 1964, to bring in Jeremy D. Lansman as a partner.] There were no other amendments to the application.

The application shows these facts with reference to the site to be employed by M & L:

- a. The engineering affidavit of Nugent S. Sharp, dated October 23, 1963, attached to the November 12, 1963, application recites that "figure 2 of this statement is a vertical plan of the

proposed installation and that it is proposed to install a guyed tower of 116 feet at the present location of the 56 foot tower in use by KADI-FM and to mount the Gates FMA-6 on the upper portion of the tower as shown, permitting the Collins 37M5 antenna of KADI-FM to remain at its present location." Figure 2 is a sketch which shows the Continental Building, and the single structure on the top thereof, the upper portion being the proposed Milam and Lansman antenna and the lower portion being the KADI-FM antenna.

b. On page 1 of Section V-B of FCC Form 301 the description of the antenna tower was shown to be "share tower used by KADI-FM." Note particularly the employment of the past tense, "used," indicating that the tower which was then used by KADI-FM was proposed to be extended by Milam and Lansman's consulting engineer.

c. On Section V-G of FCC Form 301 the description of the antenna system was "side mounted Gates Cycloid ring antenna of six sections above Collins ring antenna of station KADI-FM on guyed tower."

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d. On FAA Form 117 which was filed with the FAA and filed with the FCC by Milam and Lansman as part of their application the nature and complete description of the antenna construction were given as follows: "Increase height of existing antenna structure by 60' and install side mounted Gates FM transmitting antenna on top of the Continental Building at 3615 Olive Street in St. Louis, Missouri" and further, "existing structure to be altered on Continental Building in the City of St. Louis, Missouri, at 3615 Olive Street. Attached copy of USGS quadrangle map shows site of antenna." [Emphasis added.]

The application of Milam and Lansman was designated for hearing in a consolidated proceeding with the application of the Christian Fundamental Church (and with another application which was later dismissed) by Order of September 2, 1964 (FCC 64-821). There was no issue as to the availability of the proposed Milam and Lansman site. On September 28, 1964, Christian Fundamental Church filed a "motion to enlarge issues" to determine whether the antenna site proposed by Milam and Lansman is available to them. This Motion was based upon an investigation made by the legal counsel for station KADI-FM at the request of the legal counsel for the Christian Fundamental Church with reference to the availability of the site. Two unverified letters which were later characterized by the Broadcast Bureau as incompetent were offered in support of the allegation.

Milam and Lansman opposed the motion to enlarge issues on October 13, 1964, and stated that Jeremy Lansman (who gave an affidavit to this effect) had had discussions with a representative of the Continental Building in St. Louis, Missouri, prior to the time the application was filed and at that time he obtained assurance that the site would be available for the proposed FM station. He also checked a few days prior to the filing of the opposition on the continued availability of the site and found it to be available. An affidavit was provided by Milam and Lansman's consulting radio engineer in which he stated unequivocally that "he prepared the engineering proposal of the

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Milam-Lansman application and specified the antenna arrangement proposed therein which provides for the collinear installation of the new antenna above the existing antenna of KADI-FM on the Continental Building." He also stated that the "proposal contemplated no alteration of the antenna of station KADI-FM."

Counsel for Christian Fundamental Church then engaged a detective service in St. Louis to make further studies and investigations of

the matter, and Mr. James Minogue provided an affidavit dated October 23, 1964, in which he stated that he had interviewed Mrs. Thelma Tucker (the building manager) who said she had had no dealings concerning a lease with Milam and Lansman but that a Mr. Brennan who had held the position of agent prior to the time she assumed the duties might have. She said Mr. Brennan had moved to California and was no longer working in the Continental Building. The Church's motion was denied [FCC 64R-561, December 16, 1964].

The Broadcast Bureau, on December 7, 1964, filed its own Motion To Enlarge Issues, based on the Bureau's exchange of correspondence with Mrs. Thelma M. Tucker on the matter of leasing the antenna site to Milam and Lansman. Mrs. Tucker said that she had not authorized the use of the antenna site by Milam and Lansman.

Milam and Lansman on December 15, 1964, filed an opposition to the Bureau's Motion which included an affidavit of Jeremy D. Lansman stating that he had discussed with Mr. Brennan of the Continental Building the use of the antenna tower and had been told that "space was available for an FM station." Mr. Lansman also attached to his affidavit a letter he had received from Mrs. Tucker dated October 19, 1964, stating that she had not been able to locate the file on his earlier discussions with Mr. Brennan, but she specifically said "we do have space available on our tower in the Continental Building for lease to any broadcasting-telecasting system for antennas and transmitters and available office space for anyone who has procured a license according to the FCC regulation" [Emphasis added]

By Memorandum Opinion and Order issued January 18, 1965

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[FCC 65R-20], the Review Board enlarged the issues to determine whether there is reasonable assurance that the antenna site proposed by Milam and Lansman is available. The Board said in this Memorandum Opinion and Order that "the Board's opinion, in this regard, does not mean that a

binding arrangement is needed to demonstrate site availability." The Board went on to say that "Commission requirements are satisfied when an applicant proposes a site with reasonable assurance in good faith that the site would be available for the intended purpose." The Board's opinion continued that "because of the extensive alterations which Milam and Lansman propose to make on the roof, together with the fact that approval of the plans is a prerequisite to the use of the roof, and since it is not clear that the roof of the Continental Building is available to Milam and Lansman, Milam and Lansman have not demonstrated satisfactorily that there is reasonable assurance of the approval of said construction." The Board concluded that its action "does not, however, comprehend a determination of the suitability of the proposed antenna site and the Board notes the absence of any factual allegations concerning such a question." [Emphasis added.]

We shall now describe the proof which was adduced under the site availability issue.

Milam and Lansman brought the building manager, Mrs. Thelma Tucker, to Washington, D.C., to testify during the hearing. Mrs. Tucker identified and Milam and Lansman offered in evidence Exhibit 16, a "lease option agreement dated February 10, 1965" which was received in evidence by the Hearing Examiner. The lease option agreement recited that three individuals doing business as Harold Koplar & Associates own certain radio tower facilities on the roof of the building known as the Continental Towers in St. Louis and "are desirous of leasing said facilities to lessee" that is Milam and Lansman. The agreement continued that for the sum of \$300 (which had been paid) the lessors "grant to lessees an option to lease the aforesaid tower facilities for installation and operation of radio, tower, transmission

and antenna equipment" on terms which included a provision that the lease when executed will provide "that use conform to all necessary

governmental laws and regulations, and shall not abridge prior rights of other lessees."

Mrs. Tucker testified on direct and cross-examination (transcript 555-610) that antenna sketches had been supplied to her by Milam and Lansman prior to the execution of the lease option agreement.

Mrs. Tucker also testified regarding her authority to grant the lease option agreement. The following quotations are significant:

Bureau Counsel, Mr. Elyn: "Are you authorized to sign a lease or an option in behalf of Harold Koplar & Associates?"

A. "According to the real estate laws of Missouri, yes. I represent them, and they are responsible for any of my signatures." [T. 566.]

Mr. Elyn: "Do you do this ordinarily in the ordinary course of business during the day?"

A. "Yes." [T. 567.]

The Church's counsel then said [T. 587]:

"Under this agreement, as it is written, there is no question about the fact that if the Continental Building wished to rent to Milam and Lansman one of the legs of the present structure, they could do it, under this."

He also said [T. 589]:

Our question is whether or not Milam and Lansman really intend to build that which they said in their application."

[This was a wholly new and extraneous idea; no one pursued it.]

The Broadcast Bureau, which had petitioned for and persuaded the Board to add the issue as to site availability, filed proposed findings of fact and conclusions of law on March 3, 1965, and urged the conclusion that "M & L has reasonable assurance that the antenna site it proposed is available to it in the event its application for a construction permit is granted."

The Hearing Examiner, in his initial decision of April 12, 1965, concluded that the site availability issue "must be resolved in favor of M & L."

The Broadcast Bureau, which had requested the addition of the site availability issue, did not file exceptions, and it did not appear

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at the oral argument to contest the Examiner's conclusion that Milam and Lansman had met the burden of proof. Instead, it filed a statement endorsing the conclusion that the site is available.

B. The Review Board's Decision on the Site Availability Issue

The Review Board decided this case solely on the site availability issue. The asserted reason for its determination that Milam and Lansman had not met the burden of proof on the issue is contained in paragraph 7 on page 6 of the Decision. There the majority said that the "Milam and Lansman antenna proposal stands precisely as it did when the Board added the site issue in January 1965." The majority sets forth three asserted reasons for making this statement:

1. In January 1965 it appeared that extensive alterations were required on the roof.
2. Authority to make the required alterations had not been secured at that time.
3. Such authority could not be granted by the building's rental agent.

The majority evaluated the evidence on each of these three points in this manner:

1. The majority is not sure what alterations will be required on the roof.
2. The majority thinks that authority to make the alterations on the tower must be secured.

3. Mrs. Tucker, the building manager, does not have the authority to give the lease option agreement or approval for the alterations.

The decision is not only incorrect factually, but it represents an effort to read into the record material which is simply not there. And the M & L proposal does not stand "precisely as it did when the Board added the site issue in January, 1965." Now there is a lease option agreement, then there was none. Now there is testimony that the building manager will lease space to M & L; then there was none.

With respect to the Board's uncertainty as to what is going

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to be done on the roof of the Continental Building, we call attention to the recitation of facts set forth above (pages 6 through 8). It is clear that Milam and Lansman will extend the height of the existing tower on the roof of the Continental Building. This is Mrs. Tucker's understanding [T. 555], the FAA's understanding, and the Bureau's understanding. [A photograph of the Continental Building with the tower on top of it is attached to the Christian Fundamental Church's October 29, 1964, "Reply to Oppositions" and we urge the Commission to examine that photograph in the light of all the testimony contained herein. It shows the tower on the building roof.]

How it could reasonably be concluded that the majority is not certain as to what will be done in the way of construction is beyond us. The evidence, the applicant's proposal, and common sense indicate that the existing tower will be extended so as to accommodate the new antenna and the existing antenna will not be disturbed.

The majority seems to think that local governmental authority to make the required alterations must be secured before it can conclude that the site is available to the applicant. It ties this idea to the possible need for zoning approval and a building permit. This argument is wholly without support and is contrary to precedent. Chronicle Publ. Co.,

3 Pike & Fischer RR 2d 529. There is no zoning issue, and there is no need for idle speculation on this thought, or on what might occur if

(a) "existing broadcast lessees on the roof" might object
[They did not.] or

(b) "A building permit were refused" [No evidence was adduced on this, and surely if Church, KADI-FM, and KACO-FM can secure a building permit, so can M & L.]

As to whether Mrs. Tucker has authority, we refer the Commission to her explicit statement on the record which reads as follows:

"According to the real estate laws of Missouri, yes. I represent them, and they are responsible for any of my signatures."

[T. 566.]

We wish to comment on the majority's "about-face" on Mrs.

Tucker's authority. The majority in 1966 argues that she has no authority to approve construction details or grant the option [Decision, p. 7]. The same Board in 1965 relied on Mrs. Tucker's authority to give a statement as to the availability of the site. The Board then went so far as to waive the requirement of Rule 1.229(c) for a sworn statement, and it accepted her letter as the basis for enlarging the issues.

It is appropriate to inquire, how could the majority in 1966 reject the sworn, unimpeached testimony, given at the hearing, by Mrs. Tucker in person, after it had accepted and relied on her letter in 1965? Surely her 1966 statement, given at the hearing, before the Examiner, under oath, is entitled to credence.

The St. Louis FM case has been erroneously decided, and the majority relied entirely on one issue — a pure technicality. It cited no cases in support of the decision and it has ignored all other pertinent public interest considerations. We think the dissenting statement of Board Member Joseph N. Nelson (who concluded that the site availability

issue must be resolved in favor of Milam and Lansman and their application granted on a comparative basis) contains the conclusions of law which must be reached in this case.

As Member Nelson points out, it is "Milam and Lansman's intention to extend the existing tower." He characterizes the majority's uncertainty on whether M & L will extend the height of the tower or construct a new one as an effort "to elevate a semantic oversight to the level of probative evidence."

Member Nelson correctly points out that the Review Board itself in the Order enlarging the issues imposed the standard of proof which Milam and Lansman must meet. The Board said that approval of the plans by the "management," not the owners, of the Continental Building is a "prerequisite to the use of the roof." Member Nelson also pointed out that there was no obligation for Milam and Lansman to submit their tower alteration plans to the Commission, and it was up to them in private discussions and negotiations with the building

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management to submit their plans and to receive whatever approval was necessary. This was done [T. 561]. There was no need to secure FCC approval of the plans, or to file them with the Commission.

Member Nelson also points out that Mrs. Tucker swore on the stand that she has authority to sign lease option agreements, that she has done so in the past, that she did so for Milam and Lansman, and that the building owners permit her to do this.

The ultimate problem is that the majority concluded that it must have more than the "reasonable assurance" that a site will be available to an applicant. But "reasonable assurance" is the standard laid down by the Commission. D & E Broadcasting Co., 24 Pike & Fischer RR 455. Instead of following Commission policy the majority decided that there must be a showing of both absolute assurance that the site will be available, and of the suitability of the site.

The majority argues that it may consider the suitability of the site in reaching its determination as to its availability. This is contrary to precedent, and to the Board's order enlarging the issues herein [FCC 65R-20] where the Board said there was no need to consider suitability of the site (par. 6, page 4). The majority clearly had second thoughts and after limiting the case to an issue of availability, decided it on the suitability of the site.

As Member Nelson said in his dissent, such action is contrary to precedent and deprives M & L of "prior notice" of the existence of an issue.

We ask the Commission to decide the site availability issue on the basis of the facts, the law and common sense. The Continental Building historically has been used as an FM antenna site in St. Louis. It is available, according to the evidence before the Commission, for such use by others. The winning applicant in this case proposes to put its antenna there. The building is practically dedicated to FM broadcasting use, and the owners of the building are eager and anxious to secure more FM antennas on the roof of the building and to lease office space in it if they can.

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[Rec'd-FCC-June 7, 1966]

**BROADCAST BUREAU'S COMMENTS ON
APPLICATION FOR REVIEW**

1. Lorenzo W. Milam and Jeremy D. Lansman, a partnership (hereinafter M and L) are seeking review by the Commission of the Review Board's decision (FCC 66R-135 released April 6, 1966) denying their above-captioned application because of unavailability of transmitter site. The Review Board did not reach the comparative issue in this proceeding. ^{1/}

2. The Bureau had sought the enlargement which resulted in the site availability issue being lodged against M and L by the Review Board, FCC 65R-20, 4 RR 2d 469 (1965). However, the Bureau in its Proposed Findings supported the determination that there was reasonable assurance that the antenna site proposed by M and L was available for its proposed use. The Examiner so found and concluded. The Bureau similarly supported the site availability determination in its statement

^{1/} Hearing Examiner Jay Kyle in his Initial Decision (FCC 65D-14, released April 12, 1965) had recommended denial of the M and L application on comparative grounds while recommending a finding that the transmitter site was available to M and L.

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to the Review Board in lieu of appearance and participation in oral argument on the Exceptions of the parties.

3. The Bureau adheres to the position that the record justifies a conclusion that the antenna site proposed by M and L is reasonably available. In Paragraph No. 6 of the enlargement order wherein the site availability issue was added, the Review Board premised the enlargement upon (a) the apparent need for extensive alterations of the roof upon which the transmitter was proposed to be located; and (b) the need for approval of the plans by the building owners as a prerequisite for use of the roof. The Review Board specifically disavowed the need for a binding arrangement between M and L and the building owners. To meet their burden of proof on this issue, M and L introduced into evidence (M and L Ex. No. 16) a lease-option agreement between M and L and the building owners. This document was signed by Miss Thelma Tucker, rental agent, on behalf of the owners. She appeared as sponsoring witness of the exhibit and was cross-examined by the parties. Sketches of the plans for the M and L transmitter on the rooftop were submitted to Miss Tucker on the same day she executed the lease-option (Tr. 557).

4. No testimony or evidence was adduced to contradict the validity of the lease-option agreement. There is no doubt that Miss Tucker was clothed with a plentitude of apparent authority to bind her principals, the owners of the building. There is no indication that the lease-option agreement is anything other than a binding option. Further, the agent was shown the sketches of the plans for the rooftop installation,

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apparently contemporaneously with her signing the lease-option. She also testified that she would have to obtain the permission of the owners before the tower proposed by M and L could be erected upon the roof (Tr. 578). In our view, this does not detract to such an extent as to constitute lack of reasonable assurance as to site availability. Final binding arrangements are not required. M and L have met their burden of proof on the issue.

5. Despite our disagreement with the Review Board's resolution of the site availability issue, the Bureau is of the view that the Commission should not grant the application for review. Petitioner cites Sections 1.115(b)(2)(i) and (iv) of the Rules as grounds for review. The first of these subsections states that the action is in conflict with statute, regulation, case precedent or established Commission policy. The second subsection states that there has been an erroneous finding as to an important or material question of fact. As to the latter, we do not believe that there are any erroneous findings of fact. However, the Bureau is of the opinion that the conclusion of the Review Board as to lack of reasonable assurance of site availability is in error. With this said, we do not believe that review should be granted by the Commission. The Review Board's determination on this issue is not such a precedent-setting interpretation that will force policy changes in the future.

[701]

Most important, we do not believe that the ultimate conclusion as to availability of site under the particular facts of this case, represents such an abuse of the discretionary power delegated to the Board as to warrant review and reversal of their holding. Accordingly, the Bureau does not support the application for Review.

Respectfully submitted,
James B. Sheridan
Chief, Broadcast Bureau

by /s/ Thomas B. Fitzpatrick
Chief, Hearing Division

/s/ Edward J. Reilly
Attorney
Federal Communications Commission

June 7, 1966

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[Rec'd-FCC-June 7, 1966]

OPPOSITION TO APPLICATION FOR REVIEW

Christian Fundamental Church, by and through its attorneys, files this opposition to the Application for Review, filed herein by Lorenzo W. Milam and Jeremy D. Lansman (hereinafter "Milam-Lansman") and requests denial of said Application in that there is not involved in this proceeding any novel or important issues of law or policy worthy of consideration by the full Commission. Further, there must be administrative finality and this proceeding, which was designated for hearing on September 8, 1964, must come to an end. Milam-Lansman does not establish in its Application for Review that any error of a material fact or any error of law was committed by the Review Board in its Decision. It offers nothing to the Commission that was not before the Review Board.

Its arguments concerning the site issue were considered but rejected by the Board. Its arguments concerning the comparative aspects of this case are not supported by the record evidence and its attack upon the principles of Christian Fundamental Church is totally without justification.

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Review By The Full Commission Not Warranted:

By its Report and Order (FCC 62-612, released June 11, 1962, 23 Pike and Fischer RR 1553) the Commission amended its Rules to establish its Review Board, and delegate to it much of its adjudicatory functions. It did so to relieve the Commissioners of time consuming review of all but those cases of great importance or cases involving "novel or important questions of law or policy." As expressed by Congress in a House Report (723), 87th Congress, First Sess., page 1, to wit:

"The purpose of this legislation is to modify the Communications Act of 1934 so that the Federal Communications Commission will be able, by making better use of its own time and more effective use of its experienced and technically qualified personnel, to handle its large work load of adjudication cases with greater speed and efficiency than is presently possible.

"It is hoped and believed that these changes in the law will enable the Commission to devote more of its time to major matters of policy and planning and to the more significant adjudication cases — primarily these involving issues of general communications importance."

In line with this pronouncement of Congress, the Commission in its above-referenced Report and Order indicated that it would delegate all FM proceedings, such as this, for review by the Commission's Review Board, but that as a safeguard against delegating to the Review

Board, a case which more appropriately should be considered by the full Commission, it would, at the time of designation, review the case and if it felt that the case warranted its review it would specifically, order that the review of the case, after the Initial Decision, would be before the Commission rather than the Review Board. Further, to avoid the possibility of an apparently routine case taking on unexpected importance, the Commission granted to the Review Board authority to certify any case before it to the Commission. Finally, the Commission indicated that it would, on its own motion, order any case destined for the Review Board to be reviewed by the full Commission if such case appeared to involve a novel or important issue of law or policy warranting

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such action. Neither the Commission nor the Review Board, in this proceeding, at any stage hereof, determined that review by the full Commission was appropriate. Nothing in the Milam-Lansman Application for Review establishes or tends to establish that either the Commission or the Review Board erred in this judgment. Indeed, Milam-Lansman do not even allege that this case involves novel or important issues of law worthy of consideration by the full Commission.

Moreover, and contrary to Section 1.115(b)(4), Note, Milam-Lansman in its Application for Review seeks a determination of this case by the Commission, on its merits, rather than devoting itself to attempting to convince the Commission that this proceeding involves issues of general communications importance worthy of Commission review. Therefore, Milam-Lansman has failed to make the required threshold showing for review of this case by the full Commission.

The Board was fully competent to act upon each of the issues in this proceeding; its decision is well reasoned and based upon the record. This case is exactly the type case the Commission intended its Review Board to handle. It is respectfully requested, therefore, that the Commission pursuant to Section 1.115(g) of its Rules and Regulations deny

the Milam-Lansman Application for Review without specifying reasons for the action taken and thereby bring to an administrative end, this protracted proceeding.

The Site Issue:

As stated, supra, the Commission should deny the Milam-Lansman Application for Review, for Milam-Lansman have not established, indeed have not even alleged, that this proceeding involves novel or important questions of law or policy warranting review by the full Commission. However, to avoid any inference that silence on behalf of Christian Fundamental Church, concerning the merits of this case, constitutes an admission of the validity of the Milam-Lansman arguments, or the truthfulness of many of the Milam-Lansman misstatements,

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Christian Fundamental Church will, herein, direct itself to the Review Board's Decision.

The evidence in this proceeding, as correctly analyzed by the Review Board, establishes, clearly, that Milam-Lansman have failed to meet their burden of proof under the site issue.

The Review Board, in enlarging the issues in this proceeding to include a site issue against Milam-Lansman, made it abundantly clear why such an issue was being added. It stated [FCC 65 R-20, released January 18, 1965, paragraph 6]:

"Because of the extensive alterations which Milam-Lansman proposed to make on the roof, together with the fact that approval of the plans is a prerequisite to the use of the roof, and since it is not clear that the roof of the Continental Building is available to Milam and Lansman, Milam and Lansman have not demonstrated satisfactorily that there is reasonable assurance of the approval of said construction, and an issue will therefore be added to determine the

availability of the specified site for the use proposed."

[Emphasis Added]

The site issue reads:

"To determine whether there is reasonable assurance that the antenna site proposed by Lorenzo W. Milam & Jeremy D. Lansman, a partnership, is available for its proposed use." [Emphasis added]

Despite this clear language, however, Milam-Lansman offered no evidence in this proceeding that it has "reasonable assurance" of the "approval of said construction" or that the Continental Building is available to it for the "proposed use." The use that Milam-Lansman proposes is to construct a tower with an overall height of 116 feet above the top of the Continental Building. But at hearing, and in its Application for Review, Milam-Lansman refuses to discuss this. They argue, rather, that they propose nothing more than Christian Fundamental Church or KADI-FM. Nothing could be further from the facts. KADI-FM has its antenna on one of the legs of the existing 56 foot tower;

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Christian Fundamental Church proposes another leg of that existing 56 foot tower. But Milam-Lansman proposes additional construction (either increase the height of the existing 56 foot tower to 116 feet, or build a separate 116 foot tower), and, the issue is — is there reasonable assurance that such can be constructed? Nor is the answer to this question a mere technicality as Milam-Lansman would have the Commission believe. Not only is there a disqualifying issue specifically directed to this question, but Milam-Lansman's entire engineering showing hinges upon that question also, for unless it can construct that tower it fails not only to meet the site issue, but its proposed coverage under Issue 1, herein, is erroneous and it fails to meet its burden under that issue, also.

The evidence of record establishes that there is no assurance whatsoever that such construction can be accomplished.

Preliminarily, Christian Fundamental Church agrees with the Review Board that the record is unclear as to just what Milam-Lansman really propose — to extend the existing 56 foot tower to 116 feet or to construct a new 116 foot tower. [Compare photograph of the Continental Building submitted with Christian Fundamental Church's October 29, 1964 Reply to Opposition in this proceeding with Figure 2 to the engineering affidavit of Nugent S. Sharp, dated October 23, 1963]. However, assuming, arguendo, that the plan is to extend the height of the existing tower to 116 feet, the Review Board's Decision reaches the same result for there was a complete failure by Milam-Lansman to give reasonable assurance that any alterations could be constructed — whether it be additions to the existing tower or construction of a new tower.

Next, there is the enormity of the task of constructing that which Milam-Lansman proposes. The height of the Continental Building itself is only 277 feet [See Figure 2 of Nugent S. Sharp affidavit, supra]. The tower Milam-Lansman proposes would be over one-half the height of the building itself. It is not surprising, therefore, that the issues herein were enlarged so that Milam-Lansman could give the Commission reasonable assurance that such could be constructed. Nor is it surprising

that Miss Tucker testified, "... the additional part of the existing tower will be the responsibility of the lessee. If it is — if it can be constructed" Tr. 604 (emphasis added).

As noted, supra, Milam-Lansman offered no evidence concerning proposed construction. It contented itself, only, with submitting a piece of paper entitled "Lease Option Agreement" [Milam-Lansman Exhibit 16] signed by the building's rental agent, who, by her own admission would have to have further authority from the owners of the building to put the tower on the roof [Tr. 578]. Further, Miss Tucker testified that she would be unable to sign a lease for the owners of the building [Tr.

568]. Actually, the Review Board should not have considered the so-called "Lease Option Agreement" at all, for the document is so vague as to be meaningless. The "agreement" purports to give an option to lease the existing tower facilities of the Continental Building" for installation and operation of radio, tower, transmission, and antenna equipment . . ." None of those terms are defined. Certainly, none of those terms can be construed as granting authority to Milam-Lansman to construct anything on the roof. And certainly, based on this instrument, Milam-Lansman would have no grounds whatever, to require the Continental Building to enter into the lease which would permit it to undertake construction of a 116 foot tower. Moreover, on its face, the instrument admits that it merely looks toward a future lease and notes that that future lease is to provide that the use of the existing (56 foot) tower by Milam-Lansman will have to conform to all necessary government laws and regulations and not abridge prior rights of other lessees. On its face then, it can be seen that there is no detailed or understandable description of exactly what use may be made of that 56 foot tower and that prior to any use, a subsequent lease must be given to Milam and Lansman. Miss Tucker admits that she could not sign that lease.

In Hansen v. Catsman, 123 NW 2nd 265 (1963) the Court held unenforceable an "agreement" similar to that under consideration here.

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In Hansen, the lessor and lessee entered into an "agreement" wherein it was stated that the lessor contemplated the erection of a building and that the lessee contemplated the lease of that building for use as a drug store. Approximate dimensions were set forth (here, there is not even any approximate dimensions) with the proviso that the building was to be erected in accordance with plans and specifications and design not as yet formalized. The Court held that there was no agreement at all since the "agreement" lacked certainty and was dependent upon a future agreement on matters not specified in the "agreement to lease." It acknowledged that parties can bind themselves to prepare and execute a

subsequent agreement, but it held that all essential terms, in such an instance, must be expressed, citing 1 Corbin on Contract Section 29. The Court went on to say that if the document or contract that the parties agree to make is to contain any material terms that are not already agreed upon, no contract has yet been made, citing 1 Corbin on Contract Section 29, page 68. It is respectfully submitted that a parallel situation is present here, and that the Commission conclude that the so-called "Lease Option Agreement" [Milam-Lansman Exhibit 16] is a nullity.

One can only speculate as to why Milam-Lansman relied, solely, upon the so-called "Lease Option Agreement" signed by the rental agent of the Continental Building and prepared just one day prior to hearing on the site issue. It is logical and reasonable to conclude, however, that Milam-Lansman must have attempted to come forth, at hearing, with the best possible evidence available to it to prove that there was reasonable assurance that it could use the roof of the Continental Building to construct the tower which it proposed. It knew that failure to meet this issue would constitute disqualification; it knew that any presumptions as to site availability were now gone since a specific issue had been specified; it knew that Miss Tucker did not have authority to enter into a lease; it knew, because it had read Mrs. Tucker's letter in response to the Bureau's inquiry and contained in

the Bureau's petition to enlarge issues herein, that Miss Tucker admitted that she had no authority to grant permission for any construction atop the Continental Building roof. Yet with all this knowledge, Milam-Lansman determined to rely upon an extremely vague, unenforceable "Lease Option Agreement" signed by Miss Tucker. Actually, the document is more important for what it does not contain than what it does. There is no mention of any proposed construction; no mention of any proposed 116 foot tower; and, most important there is no mention of

any construction plans having been submitted by Milam-Lansman for approval, by anyone. Yet, Milam-Lansman knew that the Review Board specified the site issue because of the extensive alterations proposed; because approval of the plans was a prerequisite; and, because approval of the proposed construction had not been demonstrated satisfactorily in the pleadings before the Review Board at the time the issue was enlarged. As noted correctly, by the Review Board [Decision, paragraph 8] . . . "it was patently unreasonable for [Milam-Lansman] to deal with anyone other than those possessed of the authority to approve the [construction] plans." Did Milam-Lansman attempt to have its plans approved? If they did, were such plans rejected by the owners? The record does not answer these questions. What is clear, however, that the best Milam-Lansman could do was to put together an eleventh hour instrument so vague to be meaningless, and signed by one who Milam-Lansman knew had no authority to bind the building with respect to the proposed construction or to approve any plans shown to her. Such gives the Commission no assurance, whatever, that its proposed site is available to it. The Review Board had no choice but to reach the decision which it did.

In view of all the facts in this case, it must be concluded that the Review Board reached a correct decision concerning the unavailability of the Milam-Lansman site. The Commission has no more information in its possession now, than it did when the issues herein were enlarged as to site availability. The Board correctly analyzed the testimony of

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Miss Tucker. It emphasized that she had no authority to enter lease agreements and no authority to authorize construction atop the Continental Building. Moreover, the Review Board handled, correctly, the question of the sketches which were presented to Miss Tucker. It is most pertinent to note that the sketches were not presented to her until the

day she signed the lease option agreement; that Milam-Lansman did not offer the sketches in evidence, and vigorously objected (successfully) to cross-examination concerning those sketches. As the Review Board correctly notes there is no suggestion on the record that the sketches were submitted to Miss Tucker with a view of having them forwarded to persons who would have authority to approve construction on the building, and it must be remembered that Milam-Lansman knew that Miss Tucker had already told the Commission that she was not the one who determined whether construction would be authorized.

The cases cited by Milam-Lansman, and the cases cited by Board Member Nelson, in his dissent, and relied upon by Milam-Lansman, are inapplicable to this case. In Suburban Broadcasting Company, 19 Pike and Fischer RR 956 (a); Greater New Castle Broadcasting Corporation, 8 Pike and Fischer RR 291; Lebanon Valley Radio, 5 Pike and Fischer RR 2nd 65; Chronicle Publishing Company, 3 Pike and Fischer RR 2nd 529; Eastside Broadcasting Company, 1 Pike and Fischer RR 2d 763; Indianapolis Broadcasting, 10 Pike and Fischer RR 1010 (c); and W. Gordon Allen, 13 Pike and Fischer RR 1120, the Commission had under consideration Petitions to Enlarge Issues and denied them indicating that the applicant had demonstrated reasonable assurance of site availability. Those cases had to do with such matters as zoning problems, but in each instance there had been no evidence submitted which precluded the probability of the applicant obtaining zoning, etc. In some of the cases, the Commission noted that site availability will be presumed in the absence of supported allegations to the contrary, and that issues will not be enlarged if the applicant demonstrates reasonable assurance of site availability. In this case,

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however, a site availability issue against Milam-Lansman was added, since the Commission concluded that it had not received reasonable assurance of site availability. Milam-Lansman did not appeal that

determination. The Commission questioned whether the site was available to Milam-Lansman since it questioned whether Milam-Lansman could gain authority to construct the tower which it proposed. As stated, supra, Milam-Lansman despite this issue which it had to meet, came forward with no evidence which gives the Commission any more assurance now than it had when it enlarged the issues, herein. Hence, Milam-Lansman have failed to meet their burden. Another case relied upon Milam-Lansman, Edina Corporation, 24 Pike and Fischer RR 455, supports the Review Board's action in this proceeding for in Edina, like here, a site availability issue was added upon a showing that an applicant failed to give reasonable assurance that the site specified in its application will be available for the use intended.

Nor as Milam-Lansman claim, did the Review Board hold that Milam-Lansman was obliged to enter into a binding contract for its proposed site. The Board held, specifically, that "... Milam and Lansman have failed to demonstrate reasonable assurance as to the availability of its proposed antenna site."

Finally, the Board did not decide the site issue on grounds of suitability rather than availability as Milam-Lansman claim. The availability of the Milam-Lansman site is entirely dependent upon its proposed 116 foot tower. It was obliged to give "reasonable assurance" that such could be constructed. Failing to do so, it must be concluded that it has failed to show that its site is available.

To summarize, then, the Review Board is disqualifying Milam-Lansman due to its failure to meet its burden under the site issue, acted reasonably and made no material errors of fact or law. It simply had no choice but to disqualify Milam-Lansman for Milam-Lansman offered no evidence, whatever, which would give any assurance that it

can construct a tower atop the Continental Building for use by it to side-mount its proposed antenna. The Decision was well-reasoned, based

entirely upon record evidence and consistent with Commission precedent. Milam-Lansman in their Application for Review have failed to offer the Commission any evidence not considered by the Review Board, and have failed also, to substantiate alleged errors of a material facts or law committed by the Review Board in reaching its Decision. Its Application for Review, therefore, must be denied.

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[Rec'd-FCC-June 22, 1966]

[For Consideration by the Commission En Banc]

REPLY
OF MILAM AND LANSMAN

Lorenzo W. Milam and Jeremy D. Lansman, a partnership, by their attorneys, respectfully file this Reply to the Christian Fundamental Church's Opposition and the Broadcast Bureau's Comments on the Milam & Lansman Application for Review. ^{1/}

Despite the Church's contention that "there is not involved in this proceeding any novel or important issues of law or policy", the record dictates that the full Commission review this proceeding. It will be seen that the Review Board brushed aside, and failed to consider, the comparative qualifications of the applicants in a case where the differences in proposals, background, experience and fundamental qualifications are pronounced. The case was decided on one issue: the availability of the Milam & Lansman site, and on that issue the Board misinterpreted the record and departed from precedent in order to reach the conclusion that the site is not available to Milam & Lansman. It did so despite the clear showing that both applicants propose exactly the same site, and it is

eagerly offered to any FM station in St. Louis which would want to use it. As the Bureau urges in its Comments, "M and L have met their burden of proof on the issue." [Bureau Comments, page 3, para. 4]

^{1/} This Reply is filed pursuant to the provisions of Rule 1.115.

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We do not think it necessary to devote further pleading to the site availability issue. We discussed the facts and the law in the Application for Review [pages 6-15], and the Bureau's Comments should lay to rest any further debate on the subject.

We urge the Commission to consider the material issue, the extent to which each of the applicants may be entrusted to operate the proposed station in the interests of the public. This final pleading in the administrative process comes scarcely five days after the Commission issued its Opinion in the KTYM case, ^{2/} in which the Commission was concerned with a "controversy which engendered deep, understandable, and proper emotions on both sides." We think the Commission will be concerned with this case because it, too, poses serious questions under the doctrine that "controverted or controversial matters be subject to fair and adequate opportunities for reply by those of differing viewpoints." ^{3/}

The differences between the applicants are clearly shown in the record:

Milam and Lansman propose a diversified program format and a "free form" type operation which will appeal to a mixed audience, and which will not be a mere private outlet for a particular religious organization. [M & L Exhibit 1]

Christian Fundamental Church proposes a private adjunct for its religious activities, and it will follow a policy of not seeking out spokesmen for viewpoints on some controversial issues.

[T. 343]

^{2/} Complaint of Anti-Defamation League of B'nai B'rith Against Station KTYM, Inglewood, California, FCC 66-545, June 17, 1966, p. 2.

^{3/} Supra, page 3.

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The comparative choice is easy in this case because the applicants are so markedly different. Milam & Lansman are experienced broadcasters. Their broadcast records are superior and give assurance that they will provide the type of program service that they have undertaken to render for all listeners. There will be fulltime integration of ownership with management in that one of the equal partners, Mr. Lansman, will devote all his time to the station. The Church, on the other hand, has no broadcast experience, its principals will not and cannot devote full time to the station they propose, and their policies on controversial issues ring hollow when compared with their stated attitude as reflected in the testimony of Rev. Autenrieth, pastor and the controlling influence of the Church:

Q. With reference to your policy concerning the discussion of public issues, in the event that the issue of the Black Moslems [sic] were presented or were a public issue at the time in St. Louis, would you permit the use of the facilities of the proposed station by members of the Black Moslem group?

A. If that came within the Commission's rules of equal time, of course we would have no alternative. We shall not seek them out. [T. 343]

This, then, is the policy of the Christian Fundamental Church: it will not seek them out.

The Commission must appreciate why the Church will follow this policy (despite the pious declarations in its hearing exhibits that it will follow the fairness doctrine). The Church pursued from the time it was organized in 1946 until a few days before the hearing, a policy of racial

segregation in its church school in St. Louis. This was public advertised. Now, departing from the record, the Church

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asserts in its Opposition that the school is not now racially segregated [Opposition, page 17]. But even this high-sounding declaration, which is not based on the record and for which no citation to current fact or report is offered, turns out to be casuistry when the fine print is read. The Church now claims that its school "is not now racially segregated" because

"In its student body twelve different religious denominations are represented." [Opposition, page 17]

The Church has followed a longstanding policy of racial segregation, which it cannot avoid by claiming that its student body includes different religious denominations.

We shall not prolong the discussion of this complex case. The Commission is offered a choice between two applicants with diametrically opposite proposals, qualifications and policies. The Church has disqualified itself by its past policies — which we understand persist to date — and in any comparison of broadcast experience, integration of ownership with management, service philosophies, or the other traditional criteria, Milam & Lansman stand ahead of the Church.

We earnestly request review, particularly of the genuine public interest questions as to the Church's policies and practices. If the record is studied, it will be seen at once that the Church's application must be denied, and that of Milam & Lansman granted.

Respectfully submitted,

Lorenzo W. Milam and Jeremy D.
Lansman, A Partnership

By Haley, Bader & Potts

/s/ Andrew G. Haley

/s/ Michael H. Bader

Their attorneys

June 22, 1966

1735 DeSales Street, NW
Washington, D.C. 20036

[Released: July 22, 1966]

FCC 66-652
86438MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Johnson not participating.

1. The Commission has before it for consideration an application for review of the Review Board's Decision (FCC 66R-135, released April 6, 1966), filed May 13, 1966, by Lorenzo W. Milam & Jeremy D. Lansman, a partnership (M&L); (2) an opposition thereto filed June 7, 1966, by Christian Fundamental Church (Church); (3) comments on application for review filed June 7, 1966, by the Broadcast Bureau; and (4) reply to opposition filed June 22, 1966, by M&L.

2. The above applications were heard on (a) a comparative coverage issue; (b) the standard comparative issue; and (c) a site availability issue as to M&L. Hearing Examiner Kyle concluded that M&L had sustained its burden of proof under the site availability issue, and considered the applications under the two comparative issues, which he resolved in favor of Church. Thereafter, a panel of the Review Board (Members Berkemeyer and Pincock, with Member Nelson dissenting) concluded that M&L had not met its burden of proof with respect to the site availability issue and denied the application for lack of basic qualifications. The Board majority held that its judgment on the site availability issue rendered moot the comparative aspects of the case, and dictated a grant of Church's application.

3. The site availability issue was added at the request of the Broadcast Bureau to determine whether there is a "reasonable assurance" that the antenna site proposed by M&L will be available for its use. To meet its burden on this issue, M&L introduced into evidence a lease-option agreement between it and the owners of the building on which it proposed to locate its antenna. This document was signed by

Miss Thelma M. Tucker, the building rental agent, on behalf of the owners of the building after receipt of sketches from M&L disclosing their construction plans.

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Miss Tucker testified at the hearing concerning her authority to sign lease-option agreements on behalf of the owners and about the availability of the building roof top as an antenna site.

4. The Commission has repeatedly held that absolute assurance of site availability is not required but only that there be a showing of reasonable assurance of site availability made in good faith. Beacon Broadcasting System, Inc., 21 RR 727, 728 (1961); Suburban Broadcasting Co., Inc., 19 RR 956a, 959 (1960); Brennan Broadcasting Company, 15 RR 12e (1957); and B. J. Parrish, 14 RR 480, 483 (1956). We have carefully examined the record evidence in this case and are of the view that M&L has demonstrated reasonable assurance that the antenna site proposed by it is available for its use. We conclude, therefore, that M&L has met its burden of proof on this issue. The decision of the Board majority to the contrary is reversed.

5. In view of our holding on the site availability issue, we shall remand this matter to the Review Board for its further consideration of the applications under the comparative issues.

6. ACCORDINGLY, IT IS ORDERED, This 20th day of July, 1966, That the application for review filed May 13, 1966, by Lorenzo W. Milam & Jeremy D. Lansman, a partnership, IS GRANTED to the extent reflected herein and IS DENIED in all other respects; and

7. IT IS FURTHER ORDERED, That the Decision of the Review Board (FCC 66R-135, released April 6, 1966) IS SET ASIDE, and that

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this proceeding IS REMANDED to the Review Board for its further consideration consistent with this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS
COMMISSION

[SEAL]

/s/ Ben F. Waple
Secretary

Released: July 22, 1966

[Signed & Mailed -July 22, 1966]

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FCC 66R-512
93665DECISION

By the Review Board: Berkemeyer and Nelson. Pincock dissenting with statement.

1. The above-captioned applications of Milam & Lansman (M&L) and the Christian Fundamental Church (CFC) are mutually exclusive as each applicant seeks a construction permit for a new FM station in St. Louis, Missouri to operate on the same frequency (102.5 Mc/s, Channel 273). By Order (FCC 64-821) released September 8, 1964, the Commission designated these applications for consolidated hearing on issues concerning: (1) areas and populations within the proposed 1 mv/m contours and the availability of other FM services thereto; (2) the standard comparative inquiry; and (3) the ultimate public interest determination. The Review Board subsequently (FCC 65R-20, released January 18, 1965) added a site availability issue as to M&L. In an Initial Decision (FCC 65D-14) released April 12, 1965, Hearing Examiner Jay A. Kyle recommended a resolution of the site availability issue favorable to M&L and a grant of CFC's application under the standard comparative issue.^{1/} M&L filed

^{1/} Subsequent to the issuance of the Initial Decision, the Commission issued its Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 5 RR 2d 1901, released July 28, 1965, which defines and limits the areas of relevant comparative consideration, and directs the Board to decide cases before it under the policies therein set forth. Accordingly, the above-captioned applications have been evaluated under the comparative criteria.

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exceptions seeking reversal of the Examiner's Decision and CFC filed limited exceptions supporting the Examiner's ultimate result.

2. Oral argument was held before a panel of the Review Board on December 17, 1965. On April 6, 1966, the Board released a Decision granting the CFC application after disqualifying M&L for failing to sustain its burden under the site availability issue. M&L appealed to the Commission and the Review Board's Decision was set aside and the proceeding remanded to the Board for a new decision based upon comparative considerations, 4 FCC 2d 610, 7 RR 2d 765 (1966).

3. The Examiner, in favoring CFC on comparative grounds reached the following conclusions: M&L was preferred in the areas of proposed facilities and past broadcasting experience; CFC was awarded a "minute" preference for program planning, a "slight" preference for proposed programming,^{2/} a preference for local residence, and a "slight" preference for diversification of ownership of mass media. In addition, CFC was awarded a substantial preference for its greater proposed coverage. Although neither party was expressly granted an integration preference, the Examiner apparently preferred CFC in this area. Except where inconsistent with this Decision and the attached rulings on exceptions, the Examiner's findings and intermediate conclusions are adopted. To provide an adequate background for the Board's decision, some repetition of facts has been necessary.

4. M&L is an equal partnership composed of Lorenzo W. Milam and Jeremy D. Lansman. Milam has been involved in broadcasting since 1952 and in 1961 was granted a license to operate Station KRAB, an FM facility in Seattle, Washington. Subsequently, the license of Station KRAB was assigned to the Jack Straw Memorial Foundation of which Milam is the founder, president and member of the Board of Directors. Milam has been the general manager of Station KRAB, a non-commercial, listener-supported station, since its inception. He has never lived in St. Louis and does not plan to do so, although he does plan to devote 25% of his time to the proposed St. Louis station.

5. Jeremy D. Lansman resided in St. Louis until he was 15 years old and has returned for periodic visits. He has been engaged in the technical and non-technical aspects of broadcasting since 1959 and holds a first-class radiotelephone license. His professional experience includes that of chief engineer at Station KHOE, Truckee, California, and he was in charge of the construction of Station KHAI, Honolulu, Hawaii. Lansman's association with Station KRAB began in February 1962 and continued sporadically until the time of hearing. The application of M&L proposes Lansman as general manager and chief engineer of the St. Louis station; Lansman plans to move to St. Louis and devote 100% of his time to the day-to-day operation of the proposed station.

^{2/} This preference was based largely upon the additional 23-1/2 hours of weekly programming proposed by CFC.

6. CFC was incorporated in the State of Missouri in 1946 as a non-stock, non-profit, religious, educational, benevolent and scientific organization. CFC is a non-affiliated religious organization which has a congregation of about 200 members, and it ministers to an aggregate number of about 1,000 persons per week. Among its other functions, this applicant runs three schools (elementary, junior high and high schools) with a total enrollment of 250. In addition, evening high school and college level classes are conducted, the latter in conjunction with the Extension Department of the University of Missouri. Reverend Joseph L. Autenrieth has been president and chief executive officer of CFC since its incorporation. Reverend Eugene L. Maxey and Reverend H. Ralph Hebblethwaite are the vice-president and treasurer of CFC.

7. Reverend Autenrieth is the pastor of CFC and superintendent of the three Church schools. He was born and raised in St. Louis and through his clerical duties is in daily contact with local people. For eight years he has prepared and presented a radio program called "Temperance Crusade", which has been broadcast over several mid-western

stations, including a St. Louis station.^{3/} Reverend Autenrieth's professional responsibilities also include the following: the preparation and delivery of two Sunday sermons ^{4/}; guidance of church fund-raising campaigns; teaching at the CFC schools on a daily basis; performance of weddings, funerals and baptisms; the preparation and supervision of two church publications; and participation in various charitable and civic activities. If the CFC application is granted, Autenrieth will become general manager of the station; he expects to participate in the daily affairs of the station by devoting "as much time as is necessary" but has made no specific commitment as to the time he will devote thereto. He does not plan to curtail any of his present activities.

8. Reverend H. Ralph Hebblethwaite is a native of the St. Louis area and was ordained by Reverend Autenrieth in 1960. In addition to being assistant pastor of the CFC, Hebblethwaite is principal and administrator of the CFC elementary school, in which 150 students are enrolled; secretary-treasurer of the CFC; teacher in the CFC Sunday School; and teacher in the CFC elementary school four hours per day. Hebblethwaite also engages in mission work and other charitable and civic activities. Reverend Hebblethwaite's only broadcasting experience was acquired as an announcer for his college's radio station. He will be the program director if the CFC application is granted, devoting to the station as much time as is necessary with no indication that he would curtail any of his present activities.

9. Reverend Eugene Maxey has resided in St. Louis since 1950 and was ordained by Reverend Autenrieth in 1958. Reverend Maxey is vice-president of the CFC; assistant pastor of the CFC; principal of the CFC junior and senior high schools; and administrator of the academic programs of the junior and senior high schools. In addition to these

^{3/} At the time of hearing only one station, in Marion, Illinois, was broadcasting Temperance Crusade.

^{4/} Reverend Autenrieth's Sunday sermons have been broadcast by Station KJCF, Festus, Missouri.

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activities, he performs weddings and funerals and visits the sick. Reverend Maxey has had no broadcasting experience. If the CFC application is granted, Maxey will assume the position of station manager and, like the other two, will devote "as much time as is necessary to the station" while not giving up any of his present church and school activities, insofar as the record shows.

Standard Comparative Issue

10. The Board will limit its discussion on the comparative issue to factors of decisional significance under the Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 5 RR 2d 1901 (1965), which was issued subsequent to the Initial Decision herein. See note 1, supra. As expressed in the Policy Statement ". . . there are two primary objectives toward which the process of comparison should be directed. They are, first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications."

11. Diversification of Control of Mass Media. Neither of the applicants owns broadcast interests or other media of mass communication. While CFC distributes two church publications which are compiled and edited by Reverend Autenrieth, these publications appear to be internal organs distributed to CFC members. Lorenzo W. Milam, an equal partner in the M&L application, was the licensee of Station KRAB, a non-commercial FM station located in Seattle, Washington. In March 1964 Station KRAB's license was assigned to the Jack Straw Memorial Foundation, a non-profit educational corporation, of which Milam is the president, and he continues to be the general manager of that station. He is also one of the seven members of the Board of Trustees which administers the station.^{5/} Although Milam retains only a 1/7 trusteeship interest in KRAB, which is located 1,700 miles from St. Louis, he continues as general manager and "moving force" of that station. The fact that Milam has no other mass media interests in the St. Louis community, the service area or the region; that there are many

broadcast outlets in the St. Louis area; and that his interest is not complete or controlling in either KRAB or the proposal, substantially minimizes the significance of this difference between the applicants. Only a very slight preference for CFC is warranted on the facts of diversification of control.^{6/}

^{5/} Official notice is taken of the renewal application of Station KRAB, filed on November 15, 1965.

^{6/} See Policy Statement, supra, at page 394.

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12. Best Practicable Service -- Comparative Coverage. The Commission's other major objective, best practicable service to the public, includes a comparative evaluation of coverage proposed by the applicants ^{7/}, the integration of ownership and management, and, where significant, the proposed program service and past broadcast record. The facts relevant to the comparative coverage issue are as follows: M&L proposed to operate with an effective radiated power of 29.2 kw and an antenna height above average terrain of 423 feet. CFC proposes to operate with an effective radiated power of 62.3 kw and an antenna height above average terrain of 382 feet. Both applicants would locate their antennas on top of the Continental Building in St. Louis (807 feet above main sea level). The proposed 1 mv/m contours of the applicants are as follows:

<u>Applicant</u>	<u>Population</u> ^{8/}	<u>Area (sq. mi.)</u>
M&L	2,004,386	2,425
CFC	2,051,614	2,995

M&L's proposed 1 mv/m contour is encompassed within that proposed by CFC; the latter's would extend from 2.6 - 3.4 miles beyond M&L's. In total, CFC's proposal would serve 47,228 people and 570 square miles more than M&L's. Two to eleven 1 mv/m FM services are currently available in any one part of the proposed service area of either applicant;

M&L would provide a third FM service to 754 people (38 square miles), whereas CFC would provide a third FM service to this group plus 23,049 additional people (245 square miles). Virtually the entire area which would receive a third FM service is located over 30 miles from St. Louis and in the State of Illinois.

13. The stated purpose^{9/} of Class B FM facilities, such as the one herein contested, is "to render service to a sizeable community, city or town, or to the principal city or cities of an urbanized area, and to the surrounding area." Section 73.206(b) of the Commission Rules. The proposals of M&L and CFC would accomplish this purpose; the proposed

^{7/} Under the Policy Statement, comparative coverage would not be considered as a separate issue as in the instant proceeding, which was designated for hearing prior to the Policy Statement, and would only be considered "where the facts warrant." Supra at page 399. However, because of the presence of a designated issue findings and conclusions have been made on the issue as part of the general category of best practicable service.

^{8/} The 1960 populations of St. Louis and its urbanized area are listed as 750,026 and 1,667,693 persons, respectively.

^{9/} The Policy Statement, supra, page 398, makes the nature of the facility applied for a factor to be taken into account in evaluating efficiency of use.

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service area of such applicant extends over the entire St. Louis Urbanized Area and to the surrounding areas, M&L's area extending to a minimum distance of approximately ten miles beyond the urbanized area limits.^{10/} The population advantage of CFC is approximately 47,000 out of over 2 million persons encompassed within the 1 mv/m contours of the applicants, or 2.3% greater coverage.^{11/} Of these 47,000 people, only about 23,000 (1.1%) presently receive less than three 1 mv/m FM services. In view of the fact that the population

presently receiving two FM services is located over 30 miles from St. Louis and in a different state, and that both proposals serve the purposes of Class B FM facilities described in the rules which are based on geographical allocations, CFC is not entitled to a substantial preference, there having been no showing either that these people are underserved by other broadcast media or that this area is socially or economically connected with the city of St. Louis. Thus, while CFC's proposal is to be given credit for its larger coverage as the more efficient utilization of the frequency, the preference given must be slight.

14. Best Practicable Service -- Integration of Ownership and Management. The Board's comparison of the applicants' integration proposals is dictated by the Commission's Policy Statement, wherein it is stated (page 395) that:

We are primarily interested in full-time participation. To the extent that the time spent moves away from full time, the credit given will drop sharply, and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis.

To insure its goal of substantial integration the Commission considers: the type of position a principal will hold at the proposed station and the functions he will perform; whether he has been, is or will be a local resident of the community to be served; and what kind of broadcasting experience, if any, he has had.

^{10/} Official notice is taken of the material in the 1960 Census describing the St. Louis Urbanized Area. 1960 Census of Population, Vol. 1, Part A, pages 27-35.

^{11/} In Armin J. Wittenberg, Jr., 30 FCC 417, 19 RR 755 (1961) the Commission awarded only a moderate preference to an applicant who proposed to serve 4.1% more people than its opponent. In the Wittenberg case it was also held that a preference in the area of comparative coverage "is not dispositive of the proceeding, but is merely one factor to be weighed with the others in the comparative complex. . . ."

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15. M&L's proposal for integrating ownership with management of its application is granted is as follows: Milam will devote 25% of his time to the St. Louis station but will not reside in that city or hold an official position at the station. Lansman, the other 50% owner, will devote full-time to the day-to-day operation of the station in the capacity of general manager and chief engineer; he will also reside in St. Louis, the city in which he was raised. Both Milam and Lansman have had extensive broadcast experience; Milam since 1952 and Lansman since 1959. Lansman's experience has included technical and non-technical positions at Station KRAB and several other stations (see paragraph 5, supra). On the basis of these facts the Board has evaluated the showing of M&L on integration as follows: Milam does not intend to devote "substantial amounts of time on a daily basis"; therefore no appreciable credit may be given for his participation. Moreover, because Milam's proposed participation is not accompanied by full-time integration, his showing is only very slightly enhanced by his previous broadcast experience. See Policy Statement at page 396. Lansman, on the other hand, has a near optimum showing under the integration factor: he will devote full-time in a position of day-to-day management responsibility; he has held substantial and diverse broadcast experience ^{12/}; and he has lived in St. Louis in the past and will move to that city if the M&L application is granted.

16. CFC's proposal for integrating ownership with management in the event its application is granted is as follows: Autenrieth, Hebblethwaite and Maxey each intend to "devote as much time as is necessary" to the station while continuing to perform their present functions at the church and school. Each of the three CFC principals will hold an official position at the station: Reverend Autenrieth, general manager; Reverend Maxey, station manager; and Reverend Hebblethwaite, program director. To assist in the operation of the station, CFC intends to engage an "experienced broadcaster" as an assistant

general manager and executive officer.^{13/} Aside from Reverend Maxey's college radio station experience, only Reverend Autenrieth has had any significant broadcast experience, and that has been gained through his association with Temperance Crusade (see paragraph 7, supra). CFC's principals are all St. Louis residents of long duration.

^{12/} In the Policy Statement at page 396 it is noted that: "previous broadcast experience, while not so significant as local residence, also has some value when put to use through integration of ownership and management."

^{13/} This position was not included in the CFC application.

17. In evaluating these facts, the intention of Autenrieth, Maxey and Hebblethwaite to "devote as much time as is necessary" to the proposed station cannot be equated with the standard enunciated in the Policy Statement of "substantial amounts of time on a daily basis." Even prior to the issuance of the Policy Statement the Commission consistently refused to give substantive weight to "such time as is necessary" integrated proposals.^{14/} Veterans Broadcasting Company, Inc., 38 FCC 25, 50, 4 RR 2d 375, 407 (1965). At most, CFC's showing reflects the part-time participation of its three principals, to which the Policy Statement accords little weight. Although this part-time proposal is slightly enhanced by the long time local residence of the CFC principals and the broadcast experience of Reverend Autenrieth, the integration proposed by M&L remains substantially superior to that of CFC.

18. Taken alone, Lansman's full-time integration, as enhanced by past broadcast experience and past and future local residence, qualitatively far outweighs the part-time participation of all CFC's local residents. As the Board stated in Charles Vanda, 4 FCC 2d 655, 8 RR 2d 427 (1966), application for review denied FCC 66-1013, _____ FCC 2d _____, "under the policy statement, no credit can be awarded for local residence and/or past broadcast experience where the person with such residence

or experience will not be involved in the operation of the station; and to the degree that the proposed participation is less than full-time, the value of the residence or experience is diminished." Moreover, in view of the present full-time church and school activities of the three CFC principals (see paragraph 7-9, supra) and the absence of any indication these activities could or would be curtailed, it would have to be concluded that a serious doubt exists as to the amount of time which Autenrieth, Maxey, and Hebblethwaite could effectively devote to the day-to-day operation of the station, regardless of their sincere intentions.^{15/} See Grand Broadcasting Company, 36 FCC 925, 2 RR 327 (1964).

19. Best Practicable Service -- Other Comparative Considerations.

Both applicants urge that they are entitled to preferences or that, at the least, their opponents deserve demerits in the areas of program planning and proposed programming. To demonstrate its ascertainment of local needs and interests, CFC lists 39 contacts, not all of which were about program needs, and relies heavily upon Reverend Autenrieth's knowledge of the area. Of the 39 contacts listed, 13 were made prior to the filing of

^{14/} For this reason the Examiner's characterization of CFC's proposal as providing for "complete integration of ownership and management" cannot be sustained.

^{15/} CFC's intention to engage an "experienced broadcaster" to assist in the operation of the proposed station reinforces this doubt.

CFC's application on March 16, 1964,^{16/} and 26 were made after the applications were designated for hearing. About one-half of CFC's listed contacts were with people associated with various religious organizations. As to M&L, Lansman visited St. Louis in 1961 and 1963.^{17/} but kept no record of the contacts made during those visits; in October and November 1964, after the filing of the M&L application, Lansman conducted an extensive inquiry into the needs and interests of St. Louis and available program sources. As a result of the 1964 visit, Lansman listed 37

personal contacts, 16 telephonic contacts and over 100 ^{18/} responses to a questionnaire.

20. The Examiner awarded CFC a "minute" preference for program planning and a "slight" preference for proposed programming, but was of the opinion that "neither of the programming proposals offered . . . is particularly impressive." Under the Policy Statement, page 397, proposed program service (including program planning and proposed programming) is of decisional significance only where substantial and material differences "go beyond ordinary differences in judgment and show a superior devotion to public service." (Emphasis added.) Using this standard, the Board concludes that both M&L and CFC made no more than acceptable efforts to ascertain local needs and interests through local contacts and surveys.^{19/} However, these efforts reflect no great credit on the applicants, for they come very close to the "pre-planned" format approach which the Commission frowned upon in the 1960 Programming Report.^{20/} The Examiner's "slight" preference for CFC's proposed programming cannot prevail as it is "predicated largely on the fact that it [CFC] will produce 23-1/2 more hours of programming weekly than M and L." This slightly longer schedule of CFC is not of any significance in evaluating the program proposals of the applicants in a case where both applicants propose adequate hours of operation. See Southland Television Company, 10 RR 699 (1955), Enterprise Company, 9 RR 818(u) (1955).

^{16/} Although CFC amended its application subsequent to its listed contacts, the amendment was corrective in nature and none of the already proposed programs was changed.

^{17/} At this time Lansman was not involved in Milam's application (which was originally filed by Milam as an individual) but was contemplating filing a separate application for a St. Louis FM facility.

^{18/} CFC notes that some of the questionnaires were answered by college students and no specific dates or occupations are given for many of Lansman's questionnaire respondents.

^{19/} For the most part, both applicants' primary efforts to make local contacts occurred after the filing of their applications and no substantive changes resulted therefrom. However, these facts provide no basis for faulting the applicants. Saul M. Miller, 4 FCC 2d 150, 8 RR 2d 148 (1966).

^{20/} 20 RR 1901, 1915 (1960).

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21. The program proposals of the applicants are markedly different. As indicated by the Examiner's findings in paragraphs 17 through 28, M&L will have a rather high proportion of entertainment programming, but this has been designed, as have the other categories, to appeal to the better educated segment of the community. The findings in paragraph 19 of the Initial Decision, in particular, make this clear. Religious programming will contribute 6.1% of the total, educational 2.5%, news 5.3%, discussion 1.4%, and talks 2.1%. From the findings in paragraphs 29 through 37 of the Initial Decision, it is plain that CFC plans to program with particular emphasis on religion (20.5%) but with above the usual amount of time given to educational (9.3%) and news (13.9%) programs as well. Several of the educational programs will have the viewpoint of the CFC, since, initially, at least, they will be produced by the church schools. Entertainment programming will occupy only 42.2% of CFC's broadcast time, and a large proportion (65%) of the broadcast time will be sustaining.

22. Under the Policy Statement ^{21/} the substantial program differences of the two applicants can be considered only to the extent that they go beyond ordinary differences in judgment and show a superior devotion to public service. Such a showing, particularly in the case of CFC, whose programming proposals border on the specialized, requires a more detailed demonstration of need for the type of material to be broadcast than either applicant has offered here. ^{22/} The limited and largely ex post facto programming contacts of CFC, while adequate, under current Commission interpretation, to satisfy the Policy Statement demands, is not sufficient to establish the special need which is essential

to a showing of superior devotion to public service. As the Commission said in the Policy Statement,^{23/} "We will not assume . . . that an unusually high percentage of time to be devoted to local or other particular types of programs is necessarily to be preferred." Thus, no preference to either applicant for proposed program service is warranted.

23. The last comparative factor to be considered is that of past broadcast record. Under the Policy Statement^{24/} a preference or demerit is to be awarded the past performance of an applicant when performed in an ownership capacity upon a showing that such past performance has been "unusually good or unusually poor" and gives some indication of similar performance in the future. Milam is the only principal in this

^{21/} Supra, page 397.

^{22/} For discussion of specialized programming see La Fiesta Broadcasting Company, FCC 66R-308, released December 21, 1966, _____ FCC 2d _____, _____ RR 2d _____ (1966).

^{23/} Supra, page 397.

^{24/} Supra, page 398.

proceeding who has had an ownership interest in a broadcast station; however, because of the minimal nature of Milam's integration into the St. Louis station, it cannot be said that his record, compiled at Station KRAB, gives a reliable indication of performance in the future. The Commission in its Policy Statement declares that "an extraordinary record compiled while the owner fully participated in the operation of the station will not be accorded full credit where the party does not propose similar participation in the operation of the new station for which he is applying."^{25/} Since Milam's proposed participation in the St. Louis station will be much smaller than his participation in Station KRAB, his record at KRAB has little meaning here. It might be said, however, that the record evidence gives no basis for concluding that that record is a poor one. Consequently, no preference is awarded for past broadcast record.

24. Summation. In evaluating the component factors of best practicable service to the public (see paragraphs 12-23, supra) M&L merits a substantial preference in the overall category of integration of ownership and management and CFC merits a slight preference for providing service to more people, thus utilizing the frequency slightly more efficiently. Consequently, M&L is preferred in the area of best practicable service to the public. In addition to the above considerations, CFC has been granted a very slight preference in the area of diversification of control of media of mass communication. M&L's preference in the area of best practicable service to the public far outweighs the minimal preference awarded CFC in the area of diversification. It is therefore concluded that a grant of the application of M&L would better serve the public interest, convenience and necessity, and that the Initial Decision should be reversed.

ACCORDINGLY, IT IS ORDERED, This 16th day of December, 1966, That the application of Lorenzo W. Milam & Jeremy D. Lansman, a Partnership (BPH-4218), for a construction permit to operate an FM facility (102.5 mc/s, Channel 273) in St. Louis, Missouri, IS GRANTED; and that the application of Christian Fundamental Church (BPH-4402), IS DENIED.

/s/ Donald J. Berkemeyer
Member, Review Board
Federal Communications
Commission*

Attachment

Released: December 28, 1966

*See attached Dissenting Statement of Board Member Pincock

^{25/}Supra, page 398.

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APPENDIXExceptions of Milam & Lansman

<u>Exception No.</u>	<u>Ruling</u>
1	<u>Granted</u> . See paragraph 4 of the Decision.
2, 3, 4, 6	<u>Granted</u> to the extent that the Decision (paragraph 15) credits Milam with extensive broadcast experience.
5	<u>Granted</u> to the extent indicated in paragraph 4 of the Decision and <u>denied</u> in all other respects. See paragraph 23 of the Decision.
7, 13, 16, 18, 22, 23, 24, 26	<u>Denied</u> as of no decisional significance.
8	<u>Granted</u> to the extent indicated in paragraphs 5 and 15 of the Decision.
9, 10	<u>Granted</u> to the extent indicated in paragraph 19 of the Decision and <u>denied</u> in all other respects.
11	<u>Denied</u> . The additional finding requested would contribute nothing of significance to the Decision. See paragraph 19-22 of the Decision.
12	<u>Granted</u> to the extent indicated in paragraphs 19-22 of the Decision and otherwise <u>denied</u> as contributing nothing of significance to the Decision.
14	<u>Denied</u> as of no decisional significance. See paragraph 15 of the Decision.
15	<u>Granted</u> to the extent indicated in paragraphs 4 and 23 of the Decision and <u>denied</u> in all other respects for the reasons set forth in paragraph 23 of the Decision.
17	<u>Granted</u> to the extent that it is found that M&L's program proposal was amended at the time the application was amended to show the formation of the partnership on March 13, 1964. However, it must be noted that Lansman's formal program contacts occurred after that date. See paragraph 19 of the Decision.
19, 20	<u>Granted</u> to the extent indicated in paragraph 7 and 9 of the Decision.
29	<u>Denied</u> , see paragraph 12 of the Decision.

Exception No.	[744] Ruling
21, C2(b)	<u>Granted</u> to the extent indicated in paragraph 19 of the Decision.
25	<u>Granted</u> to the extent indicated in paragraph 7 of the Decision and <u>denied</u> in all other respects.
27	<u>Granted</u> to the extent indicated in paragraphs 8-9 and 16 of the Decision and <u>denied</u> in all other respects.
28	<u>Denied</u> . The Examiner ruled correctly and in accordance with the Commission's technical rules. The material excluded does not constitute a proper engineering showing.
C1	<u>Granted</u> to the extent indicated in paragraph 13 of the Decision and <u>denied</u> in all other respects. See ruling on Exception 28.
C2(a)	<u>Granted</u> as indicated in paragraphs 19-22 of the Decision.
C2(c)	<u>Denied</u> . The Examiner's statement is supported by the evidence of record. See paragraph 7 of the Decision.
C2(d)	<u>Granted</u> .
C2(e), (f)	<u>Granted</u> to the extent indicated in paragraphs 19-22 of the Decision and <u>denied</u> in all other respects.
C3	<u>Denied</u> for the reasons stated in paragraphs 19-22 of the Decision.
C4, C6	<u>Granted</u> as indicated in the Decision. See paragraphs 14-18 of the Decision.
C5	<u>Granted</u> as indicated in paragraph 16 and footnote 13 of the Decision.
C7	<u>Granted</u> to the extent indicated in paragraph 11 of the Decision and <u>denied</u> in all other respects.
C8	<u>Denied</u> for the reasons stated in paragraphs 20-22 of the Decision.
C9	<u>Granted</u> in part and <u>denied</u> in part as reflected in the whole of the Decision.
C10	<u>Granted</u> as indicated by the Decision.

Limited Exceptions of Christian Fundamental Church*

<u>Exception No.</u>	<u>Ruling</u>
1, 10, 11, 12, 13	<u>Denied</u> for the reasons set forth in the Commission's Memorandum Opinion and Order, 4 FCC 2d 610, 7 RR 2d 765 (1966).
2, 8	<u>Denied</u> as of no decisional significance.
3, 5	<u>Granted</u> to the extent indicated in paragraph 19 of the Decision and <u>denied</u> in all other respects.
4	<u>Granted</u> to the extent indicated in paragraph 5 of the Decision and <u>denied</u> in all other respects.
6	<u>Granted</u> to the extent indicated in paragraphs 7, 16, 17 and 19 of the Decision and <u>denied</u> in all other respects.
7	<u>Denied</u> as of no decisional significance. See paragraph 23 of the Decision.
9, 19	<u>Granted</u> in part and otherwise denied as of no decisional significance; see paragraphs 16 and 17 of the Decision. See also <u>Policy Statement on Comparative Broadcast Hearings</u> , 1 FCC 2d 393, 5 RR 2d 1901 (1965) wherein the Commission has set forth the relevant areas of inquiry in a comparative broadcast hearing.
14, 15, 16, 17, 18	<u>Denied</u> for reasons stated in paragraphs 19-22 of the Decision.
20	<u>Denied</u> for reasons stated in paragraphs 14-18 of the Decision.
21	<u>Denied</u> . Under the Commission's <u>Policy Statement</u> , <i>supra</i> , civic participation is considered, as it has been in this Decision, as part of the local residence factor of integration of ownership and management, and no separate conclusion or preference need be based thereon. See paragraphs 16 and 17 of the Decision.

*Several of the exceptions submitted by Christian Fundamental Church are grossly violative of Section 1.277 of the Commission Rules in that they fail to point out with particularity the errors alleged and are argumentative and lengthy in nature. However, in order to afford this party as full a hearing as possible the Board has decided to rule upon the substantive matters contained in these exceptions to the extent possible.

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Exception No.Ruling

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Granted to the extent indicated in the Decision and denied in all other respects. See paragraphs 5, 7-9, 15-16, and 23. This exception is so lacking in the particularity required by Section 1.277 of the Rules that the Board finds it impossible to rule upon it with any greater degree of specificity.

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**DISSENTING STATEMENT OF
BOARD MEMBER DEE W. PINCOCK**

I dissent to the ultimate conclusion reached by the majority of the panel in this case. I find no fault with the facts found by the Examiner and the Board, but I am unable to conclude from these facts that the public interest would be better served by a grant to Milam and Lansman.

The Christian Fundamental Church has ministered to the spiritual needs of a St. Louis congregation for twenty years. Reverend Autenrieth, long its Pastor, will serve as General Manager of the proposed station, Reverend Maxey, an Assistant Pastor, as Station Manager, and Reverend Hebblethwaite, an Assistant Pastor, will serve as Program Director. While admittedly these church officials have not had extensive broadcasting experience, nevertheless their close ties to the community and their extensive experience in church administration and related public service activities, in my opinion, offer greater assurance that the proposed station would be operated in the public interest than can be expected from the Milam and Lansman partnership. I would, therefore, grant the application of Christian Fundamental Church.

[Received Feb. 8, 1967 - FCC]

**COMMENTS OF BROADCAST BUREAU ON
APPLICATION FOR REVIEW**

On January 27, 1967, Christian Fundamental Church (hereinafter CFC) filed an application for review of the Review Board's Decision which granted the facility sought to Lorenzo W. Milam and Jeremy D. Lansman, a partnership (hereinafter M&L), 6 FCC 2d 198.

1. Insofar as the application seeks review of the Decision on comparative grounds, we make no comment in light of our policy of non-participation in comparative matters. However, starting at page 20 of the application, CFC makes the argument that review should also be granted as to the site availability issue against M&L.

2. Briefly, the facts are these. A site availability issue was added against M&L by the Review Board at the request of the Bureau. The Initial Decision of the Examiner (FCC 65D-14 released April 12, 1965) recommended a resolution of the site issue

favorable to M&L and a grant on a comparative basis to CFC. The Review Board reversed the favorable finding as to M&L's site availability, thus disqualifying M&L and granting CFC's application. In so doing, the Review Board did not address itself to the comparative merits of the applicants. M&L then filed an application for review which the Commission granted, reversing and remanding the proceeding to the Review Board for a decision on a comparative basis, 4 FCC 2d 610 (1966).

3. It is this remand Memorandum Opinion and Order of the Commission which is cited by the instant application for review as grounds for taking the Review Board's Decision under review on the question of site availability. As the pleading states at p. 21:

The Commission is requested to review the Decision in this matter . . . including the site issue. The Board, in its Decision after remand was obliged to make a specific determination as to the final disposition of the site issue, as an element of its Decision; failure to do so was a defect in its Decision.

. . . In this connection, therefore, it is shown that Milam-Lansman did not meet his burden of proof with respect to the issue against it on site availability.

4. The Bureau disagrees with this interpretation of the remand order. As the order makes plain, 4 FCC 2d at 611:

We have carefully examined the record evidence in this case and are of the view that M&L has demonstrated reasonable assurance that the antenna site proposed by it is available for its use. We conclude, therefore, that M&L has met its burden of proof on this issue. The decision of the Board majority to the contrary is reversed.

5. In view of our holding on the site availability issue, we shall remand this matter to the Review Board for its further consideration of the

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applications under the comparative issues.

5. The Bureau is of the opinion that clearly the site availability issue was decided by the Commission, supra. Accordingly, there was nothing for the Review Board to decide as to site availability upon remand. The application seeking review on this issue should be denied.

Respectfully submitted,
George S. Smith, Chief, Broadcast Bureau

by: /s/ Thomas B. Fitzpatrick
Chief, Hearing Division

/s/ Edward J. Reilly, Attorney, FCC

February 8, 1967

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[Received Feb. 13, 1967 - FCC]

OPPOSITION TO APPLICATION FOR REVIEW

Milam & Lansman, by their attorneys, respectfully file this opposition to the Application for Review submitted on January 27, 1967, by Christian Fundamental Church. This opposition is filed in accordance with the requirements of Rule 1.115(d).

I.

INTRODUCTION

The Commission's Review Board on December 28, 1966, granted the application of Milam & Lansman for a new FM station in St. Louis, Missouri.^{1/} It denied the competing application of Christian Fundamental Church. [Decision, 66 R-512, 8 Pike & Fischer RR 2d ____].

^{1/} The Review Board decided the case once before (7 Pike & Fischer RR 2d 765) on the sole issue of site availability. The full Commission set aside the first Decision and remanded the proceeding for further consideration.

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Milam & Lansman were preferred because of their substantial comparative superiority in the "overall category of integration of ownership and management" [Decision, para. 24]. This, the Review Board concluded, offers promise of the "best practicable service to the public."

As the Review Board viewed the record, Milam & Lansman, experienced broadcasters, would participate meaningfully in the station's operations (Lansman 100% of his time and Milam 25%). The Church, with no broadcast experience, could not offer any meaningful participation in station operation, especially since the pastor and his assistants are swamped with their duties both in the church (1000 worshippers) and its schools (250 students). Accordingly, the Review Board granted the Milam & Lansman application.

The Review Board correctly applied the Policy on Comparative Broadcast Hearings, 5 Pike & Fischer RR 2d 1901. We urge that its Decision be affirmed, and our replies to various points raised in the Application for Review appear in Section II hereof.

Before considering the matters which the Church raised in its Application for Review, we wish to refer briefly to an important factor which the Church failed to mention: It could have lost the case on another significant basis not even mentioned in the Decision, namely, its determination not to permit the use of its broadcast facilities for the discussion of public issues of significance to the station's service area.

[755]

We briefed this matter before the Examiner and the Review Board. It was not considered in the Initial Decision, the first Decision or the Decision on remand which is now before the Commission en banc.

We think this issue is important, so we shall cite a few examples of how the Church would operate the station if it were granted the license:

Until a few days prior to the hearing, the Church publicly advertised that its schools were racially segregated [T. 345-7]. The Church and its schools always have been completely devoid of integration. This announced policy was abandoned in November 1964, a few days before the hearing, but de facto segregation in the Church and its personnel and the school and its personnel continued [T. 348-9]. This seems to explain why the Church's policy, as expressed by the pastor, Dr. Joseph L. Autenrieth, would be antagonistic to the operation of the proposed station in accordance with its obligations under the Fairness Doctrine.

The Church would not carry certain programs on racial matters "unless the Rules required." [T. 343]. And, as another example, in the event Dr. Martin Luther King requested the use of the proposed facilities of the Christian Fundamental Church's station to request solicitation of funds to support activities of CORE in the State of Mississippi, Rev. Autenrieth said he would permit an occasional request of this nature to be granted but there would be no regularly scheduled program [T. 356-7].

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The Church would carry a regularly scheduled temperance crusade program similar to one Rev. Autenrieth has taped in the past. Rev. Autenrieth maintained that the matter is not a controversial issue and he knows of no opposing viewpoint and has never sought to find one [T. 358].

The Church would emphasize on the proposed station its own activities and aims. The Church's station will be known as the Full Gospel Voice. It will carry every Sunday the one-hour sermon of Dr. Autenrieth and his Church's evening service; it will carry every day his Temperance Crusade; it will carry every week-day morning his Church's School's Chapel Hour; at least 20.5% of its time will be devoted to religious programs, and on cross examination Rev. Autenrieth admitted that other seemingly non-religious programs will also spread his gospel message ("Tots to Teens," seven days a week, is an example: it is listed as educational but will be directed to people of evangelical persuasion); and the persons interviewed by the Church are predominantly religious leaders, ministers, the Church's members, or Dr. Autenrieth's friends; the Church's views will be carried by not contrasting views.

This and other evidence of record underscores the most significant factor in the case: The Church cannot be expected to carry out its licensee obligations under the Fairness Doctrine.

By contrast, Milam & Lansman's concept of the duty of a broadcast station is as stated by Mr. Milam:

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"A radio station should have a general overall balance in programming to get, for instance, extreme views, middle of the road views, religious and non-religious views. Everything should balance out." [T. 277.]

Milam & Lansman can point to a record of adherence to this policy [T. 234, 238, 256, 274, 277, 289, etc.].

If this case is reviewed by the full Commission, the foregoing should be the items considered by it, not the matters advanced by the Church in its Application for Review.

II.

RESPONSES TO THE CHURCH'S ARGUMENTS

The Church seeks review of the Decision in this case because of "conflict with the Commission's Policy Statement," and "erroneous findings."

We respectfully submit that the Church has failed to show any basis to disturb the Review Board's Decision. Community Broadcasting Service, Inc. v. Federal Communications Commission, ___ U.S. App. DC ___, ___ F2d ___, Case No. 20384, decided February 6, 1967.

Lansman's Position as General Manager

As was the situation in Community, the Church has now raised a matter which it did not bring up earlier: The Church argues that Jeremy D. Lansman can serve only as Chief Engineer of the station, not as General Manager, as proposed [Application pp. 2, 7]. There was no question at any stage of the case as to Mr. Lansman's ability

[758]

to serve as General Manager. He will devote 100% of his time to the station. Clearly, the Church's argument is without merit.

The Inability of the Church's Ministers to Devote Time to the Station

The Church argues that its ministers will be available to work at the station. The record shows the opposite. They are so heavily involved in ministry, administration of the church and schools, and the myriad details of their ecclesiastical calling that they cannot devote any significant amount of time to the proposed station.

The Review Board correctly decided as much. It found each of the three ministers tied up in several hours of daily teaching at the Church schools, and a mass of other work and none of them will give up these activities. [Decision, paras. 7-9.]

There is absolutely no basis for the Church's claim that its principals can or will devote any meaningful amount of time to the proposed station.

We think it highly significant that the Church found it necessary to add to its proposed staff an Assistant General Manager. This was done in the four weeks before hearing. Surely this step would not have been taken had the Church been able to show that its principals can and will put in much time at the station.

[759]

Programming

The Church attacks Milam & Lansman's program proposal, but for the most part it challenges the record of KRAB(FM) in Seattle, founded and managed by Mr. Milam. That the Church would criticize this station is evidence of utter lack of comprehension of what a genuinely fine broadcast station is.

KRAB is a noncommercial educational FM station operated by a foundation. Its programs extend to a broad spectrum of music, culture, discussion, education and the fine arts. In the 1964 composite week, 40.6% of its program time was "live." Its programs have included

Music
 Commentary
 Children's Program
 Political Talks
 Music of Dufay
 Film Review
 The Theatre & Its Double
 Music of Mozart
 James Baldwin
 Readings of Periodicals
 Jean Shepard Monologue
 Music of Schoenberg
 Music - Jazz

Mississippi Report
 Music for Yom Kippur
 Poetry Program
 Divorce & Trial Run Marriage
 Music of Bach
 Folk Music
 Music of Indian, Jazz
 Cantatas of Bach
 Soviet Press & Periodicals
 A Country Doctor by Kafka
 Two Works by Edgar Varese
 Economic Growth of India
 Music of Frescobaldi

Film Review
 Baroque Music
 The Rise and Fall
 Music of Schubert
 Music of Russia
 Catholicism Reconsidered
 1066 & All That
 The History of Music
 Philosophy East & West
 Music of Boccherini
 Music of Purcell
 Music for Orchestra

A Country Doctor
 Archie & Mehitabel
 Ethnic Music of Spain
 What is a Boss
 The Indian Queen
 The Philosophy of Ayn Rand
 The Turn of the Screw
 The Shaw Terry Letters
 Rexroth Book Review
 Sunday Concert
 Music from the Italian
 Broadcasting System

[760]

The Great Advocate
 Antigone in Greek
 Antigone: The Opera
 Music of Canada
 Reading from Jessica Mitford
 Three Bach Motets
 Infra Red
 Piano Music of Prokofiev
 African Periodicals
 Dixieland Music
 Reading from Ebony
 Music of Josquin
 Interview: Politics in the
 Middle East

Reading from the New Statesman
 Music of Korea
 Live Panel: Outdoor Advertising
 Economic Growth: Latin America
 Music for Looking Back
 Friday Evening Concert
 The Great Ladies Show
 The Soul & Telepathy
 Kenneth Rexroth Books
 The Psychology of Accident Sickness
 Alan Rich History of Music
 Music of Carter
 Music of Stamitz
 Sunday Afternoon Concert

Is this "performance very poor" as the Church says? [Application, p. 15.]

With reference to certain language carried in some KRAB programs, the Church has misstated the record. KRAB has rejected programs for many reasons, including on some occasions simply the use of objectionable language [T. 278]. Where language which is not normally regarded as acceptable is used in an intelligent manner in literature, and is necessary for the conveyance of the context of the literary work, it might be carried by the station [T. 279]. Mr. Milam testified on that point that if the work "had literary merit, was well produced, was a high work of art, and I felt it was very important in an artistic way, then I would produce it. I would put it on the air. I would put it on the air late in the evening, but I would put it on the air." [T. 279.]

[761]

Broadcast Experience

Milam & Lansman merit the substantial preference they earned for broadcast experience (Decision, paras. 4, 5 and 18).

Milam & Lansman have had many years of broadcast experience, Milam since 1952 and Lansman since 1959. The Church's principals have never operated a broadcast station. The Church's sole claim to broadcast experience is that the pastor broadcast a "Temperance Crusade" program for eight years. The Church conceded (p. 9) that its broadcast experience is "not extensive." The assertion (p. 4) that Rev. Maxey, assistant pastor, has had "some broadcast experience" is without factual foundation. See Decision, para. 9, and see Church Exhibit 3, pp. 9, 10 and 11.

Diversification of Media of Mass Communication

The Church claims a preference because it has no other broadcast interests, whereas Milam & Lansman have an interest in KRAB(FM), Seattle, Washington. The Review Board granted "only a very slight preference."^{2/} Its treatment of the point is readily understandable: KRAB is a noncommercial FM station, located some 1700 miles from St. Louis, Milam has a 1/7 trusteeship interest in KRAB. We think nothing further need be said on this subject.

Site Availability

The Church renews its effort to show that Milam & Lansman do not have available an antenna site. The full Commission decided

^{2/} Decision, para. 11.

[762]

this issue on July 22, 1966, 7 Pike & Fischer RR 2d 765, and there is no need to reargue the matter.

We must reproach the Church for implying (page 21) that the Federal Aviation Agency has not approved the Milam and Lansman site proposal. The necessary FAA approval was secured on December 10, 1963. (Case No. 3-OE-4794.) The Church has known this. Indeed, it proposed the same site for its own station.

Coverage

The Church received a "slight" preference because its station would cover about 2% more persons than the Milam & Lansman facility. The Review Board concluded that this small difference was of no decisional significance because the area in which the Church would add a signal is well served now; the "2% population gain" would be in a different state, located more than 30 miles from St. Louis, and has at least two services now. No need for the new St. Louis signal in this area was shown.^{3/}

The Review Board cited Armin H. Wittenberg, Jr., 19 Pike & Fischer RR 755 as one precedent supporting its conclusion that comparative coverage should not be decisive here. In that case a 4.1% coverage advantage was held not be decisive. The Church argues that Wittenberg is not comparable to this case because the "4.1% population gain" received more services than would the Church's "2.% population gain."

^{3/} Decision, paras. 12 and 13.

The Review Board correctly applied the law: a minimal difference in coverage has only a minimal comparative effect and number of available services to the area of difference is of minor consequence. In fact, the number of other services is generally of no consequence. In WBUD, Inc., 23 Pike & Fischer RR 135, the Commission denied an application which would have brought the first and only FM service to 32,066 persons in a "white area," and it granted a competing applicant which proposed no white area coverage.

Surely, since a proposal to serve a small white area in WBUD was not decisive, the Church's proposal to add a third service cannot be held to be controlling here.

III.

CONCLUSION

We urge the Commission to deny the Application for Review.

Respectfully submitted,

Milam & Lansman

By Haley, Bader & Potts

/s/ Michael H. Bader
Their attorneys

* * *

February 13, 1967

[772]

FCC 67M-341
96678

ORDER

1. The Commission having under consideration a motion for extension of time and a supplement thereto, filed February 27, 1967 and February 28, 1967, respectively, by Christian Fundamental Church;

2. IT APPEARING, That petitioner seeks an extension of time to and including March 7, 1967, within which to file a reply to the opposition to application for review, filed herein, by Milam and Lansman, and that counsel for the other parties have consented to a grant of the instant request;

3. IT IS ORDERED, This 1st day of March, 1967 in accordance with the authority delegated to the Chief, Office of Opinions and Review pursuant to Section 0.371 of the Rules, that petitioner's request for an extension of time IS GRANTED, and the time within which to file a reply to the opposition in the above-mentioned proceeding IS EXTENDED to and including March 7, 1967.

FEDERAL COMMUNICATIONS COMMISSION

Released: March 2, 1967

/s/ Ben F. Waple
Secretary

[773]

[Received Mar. 7, 1967 - FCC]

DALY AND JOYCE

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March 7, 1967

Honorable Ben F. Waple, Secretary
Federal Communications Commission
Washington, D.C. 20554

Christian Fundamental Church
St. Louis, Missouri
Docket No. 15617
Reply to Opposition to Application
for Review

Sir:

Forwarded on behalf of Christian Fundamental Church is its Reply to Opposition to Application for Review in the above-referenced proceeding.

Very truly yours,
/s/ Leonard S. Joyce
DALY & JOYCE

[774]

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

Christian Fundamental Church (hereinafter called CFC), by and through its attorneys, and in reply to Milam-Lansman's Opposition to CFC's Application for Review, herein, sets forth the following:

Milam-Lansman does not challenge CFC's showing that review is imperative in this proceeding to enable the Commission to outline the obligations of the Review Board in deciding comparative cases in a manner to insure compliance with the ultimate objective set forth by the Commission in its "Policy Statement on Comparative Broadcast Hearings",^{1/} nor does Milam-Lansman successfully refute the record evidence set forth by CFC in its Application for Review establishing that the two primary objectives of the Commission - best practicable service to the public, and maximum diffusion of control of media of mass

communication - will be better served in this case, by a grant of CFC. Milam-Lansman fail to set forth any facts, precedent or arguments which detract from the points advanced in CFC's Application for Review, and CFC continues to rely upon that document in support of its request for review by the full Commission.

¹/₅ Pike & Fischer RR 2d 1901.

[775]

Milam-Lansman's reliance upon the Court's decision in Community Broadcasting Service, Inc. v. Federal Communications Commission, __ US App. D.C. __, __ F 2d __, (Case No. 20384, decided February 6, 1967) is misplaced. That per curiam opinion affirmed a Decision by the Federal Communications Commission in a case where the Commission correctly favored the winning applicant on the basis of maximum diffusion of control of mass media and the best practicable service to the public. There simply is no analogy between the Community case, supra, and the Review Board's decision in this proceeding.

Milam-Lansman's terse "responses" to CFC's comparison of the qualifications of CFC vis-a-vis Milam-Lansman, under the various comparative factors, delineated by the Commission in its Policy Statement, supra, distort the record evidence, and fails to relate isolated testimony to the two primary objectives of the Commission in comparative cases; its "attack" upon CFC respecting CFC's proposed policy on the discussion of public issues, is based upon pure fantasy. Reply to each argument advanced by Milam-Lansman follows.

In its Opposition (M-L Opposition pages 5-6) Milam-Lansman assert that CFC argues that Lansman can serve only as chief engineer of the station and not as general manager. This is inaccurate. What CFC said was that Lansman proposes to be general manager and chief engineer; that when he is engineer he cannot be the manager, and when he is manager he cannot be the engineer; that his managerial responsibilities must be considered reduced by the need for substantial time and attention

to engineering duties; and, that Lansman's primary experience has been as an engineer [CFC Application for Review, page 7]. Add to this, the fact that Lansman will have a regular, daily, announcing assignment, [Milam-Lansman Exhibit 6; CFC Proposed Findings of Fact, pages 58-59], and it becomes evident that the major portion of Lansman's time must be devoted to technical and announcing duties. These matters have not been raised for

[776]

the first time in the Application for Review. From the beginning, CFC has pointed up the fact that Lansman will be the chief engineer of the station; that he will announce on the station; that he has had no managerial experience; and that the only meaningful experience of Lansman has been in the field of engineering. [CFC Proposed Findings of Fact, pages 58-9, CFC Proposed Conclusion of Law, pages 75-76]. Moreover the Hearing Examiner found and concluded that Lansman would be the Chief Engineer of the station [Initial Decision page 16, para. 38; page 25, para. 11], as did the Commission's Review Board [Review Board Decision, para. 15].

Milam-Lansman completely distorts this record when it alleges that the principals of CFC cannot devote any significant amount of time to the proposed station. [Milam-Lansman Opposition, page 6]. Milam-Lansman did not and could not cite the record in support of that erroneous allegation. Auteprieth teaches one forty minute class per day and all of his present duties can be accomplished in two hours each day. [Tr. 387-8] Maxey can and will, if necessary, delegate his teaching responsibilities to other teachers, and devote that additional time to the operation of the station [Tr. 393-4]. The testimony, viewed fairly, establishes that the CFC station is foremost in the minds of its principals; that they will actively participate in the day-to-day management and operation of the station; and, that they will be on-the-scene at all times to assure continuous supervision [CFC Application for Review, pages 4-6]. As for Milam-Lansman's claim that the proposed assistant general manager demonstrates that CFC's principals cannot devote time to the station, the

record is to the contrary. No managerial responsibilities will be delegated absolutely to that assistant manager [Tr. 309-10], and as stated in CFC's Application for Review, CFC intends to, and the Commission surely expects it to, hire a competent, and where possible, an experienced staff. [CFC Application for Review, page 10]

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Respecting the programming of station KRAB, Milam-Lansman list, without comment, programs carried by station KRAB in the past. Such a list is meaningless. There is no evidence of record that such programming serves the needs of Seattle residents, and without explanation, it is difficult to tell the content of many programs. Further there is no way to examine the quality of the presentation or the response of the listening audience. What is important is that Milam and Lansman fails to direct itself to a defense of the marginal operation of KRAB (with its part time schedule, two paid announcers, no wire service, no afternoon programming, etc.) and its attempt to justify objectionable language, and in certain instances objectionable programming content, falls far short of squaring such a philosophy with the public interest.

Milam-Lansman [Opposition, page 9], continues to rely heavily on the broadcast experience of Lansman. The broadcast experience of Milam-Lansman appears on this record, and under no stretch of the imagination can Lansman's experience be characterized as other than minimal, and at that, primarily in the field of engineering. Milam and Lansman fails to address itself to the facts that Lansman has had no sales experience and no managerial experience and yet proposes to be the general manager of a commercial station, and fails, also, to relate Lansman's limited broadcast experience to the two primary objectives of the Commission in examining competing applicants for the same facilities. There simply is no basis for concluding that Lansman's experience gives assurance of continuous attention to the needs and interest of St. Louis residents. Indeed, as established by CFC [CFC Application for Review, pages 6-11], Lansman's background and experience gives far less assurance of devotion to the public interest, than does CFC.

WBUD, Inc., 23 Pike & Fischer RR 135, cited by Milam-Lansman supports CFC's claim for a strong preference respecting coverage. In WBUD, a "distinct" preference was awarded for greater needed service. Here,

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too, CFC is to be awarded a "substantial" or "distinct" preference, and for the same reasons. However, in WBUD, unlike here, this preference was counter-balanced, for the applicant proposing the less efficient operation, nevertheless gave the Commission greater assurance of responsiveness to community needs and a greater likelihood of effectuation of program proposals. Here, Milam-Lansman cannot counter-balance the distinct or substantial preference to CFC on coverage, for it is CFC and not Milam-Lansman that gives the Commission greater assurance of sensitivity to the community's programming needs and the best practicable service to the public.

In support of the Review Board's treatment of diversification of media of mass communication, Milam-Lansman point to Milam's less than controlling ownership interest in KRAB and to the distance between the communities of St. Louis and Seattle. In so doing, Milam-Lansman (and the Review Board) fails to grasp the clear policy of the Commission in this regard. In its Policy Statement, supra the Commission clearly and unequivocally states that it looks for "maximum" diffusion of control of mass media, and that such is a factor of "primary significance" and constitutes a "primary objective in the licensing scheme". [5 Pike & Fischer RR 2nd 1908]. It goes on to say that it will consider common control and less than controlling interest in the broadcast stations involved [Ibid]. It indicates that it will consider all common ownership as "significant" [Ibid, 1908-9] but that certain cases will be more significant than others. Milam has an ownership interest in and controls the operation of KRAB, Seattle, Washington. If the Milam-Lansman proposal were granted he would have a 50% ownership in an FM station in St. Louis, St. Louis and

Seattle are major markets in this country. These facts cannot be denied. These facts are significant in determining one of the two primary objectives of the Commission's licensing scheme. The Commission did not say that it is interested, only, in common media

[779]

which are in the same market. It did not exclude common ownership in different markets separated by 1700 miles. It did not exclude common ownership of less than controlling interests. Rather it has stated clearly and unequivocally that any common interest is significant. [Ibid] CFC, therefore, is entitled to a preference and not a "minor" or "slight" preference. And the preference is significant.

Milam-Lansman and the Commission's Broadcast Bureau address themselves to the position taken by CFC, in its Application for Review, respecting the site issue in this proceeding. It is the position of CFC that the Review Board should have, at the very least, set forth ultimate findings and conclusions respecting the site availability issue, and, thereby, issue a Decision respecting all issues of the case. With respect to the arguments advanced by CFC to the full Commission, requesting the Commission to reconsider the site availability issue, it is the position of CFC that the entire case is again before the Commission for its review. At this point, and since CFC has filed an Application for Review, there has not been administrative finality. The Commission, therefore, can, and CFC submits that it should, re-examine its previous order respecting the site availability issue, and, upon re-examination conclude that Milan and Lansman have failed to meet its burden under that issue.

In its Application for Review, CFC was in error in alleging that the Federal Aviation Agency has not made a determination of no hazard to aviation, respecting the antenna system proposed by Milam-Lansman. CFC hereby specifically withdraws that allegation, which it made unintentionally. CFC does re-emphasize, however, that the record in this proceeding offers no assurance that Milam-Lansman can in fact build the structure it proposes, and that the building of such a structure has not

been authorized by the owners of the building, or by the city, and that there is no evidence whether such a structure would comply with local

[780]

zoning laws, building codes, or the like.

One final point remains. Milam-Lansman, as it has done throughout this proceeding, has "attacked" the principals of CFC, has implied that CFC's station will be anti-negro, and will otherwise not adhere to the Commission's Fairness Doctrine. Let us set the record straight. CFC, the applicant in this proceeding is not a church, nor a school. It is a non-profit corporation, which operates a church and a private school in St. Louis, Missouri. It now seeks to operate a broadcast station. The proposed station will be neither a part of the church nor the school, although it is proposed that certain programs will be produced by the ministers of the church and the faculty of the school. [CFC Proposed Findings of Fact, pages 10-11] The school is not a "church school" in the sense of a parochial school. Within the student body, which numbers only about 250 students, there are represented 12 different religious denominations, and no effort is made to change anybody's mind concerning his religious beliefs [Ibid pages 11-12]. There is no obligation for any of the students to attend the church services [Ibid]. Until 1964, the school was segregated, but is no longer. CFC's church never had a policy of segregation [Tr. 538] and members of the negro race quite regularly worship at the Church [Ibid]. As for the policy of the station, Autenrieth testified that the station would never exclude a record or a talk or a discussion or any other broadcast over the station based upon the fact that the artist or participant was a member of the negro race [538]. There simply is no evidence that any racial discrimination will be practiced by CFC's broadcast station. Respecting its allegation that CFC would violate the Fairness Doctrine, Milam-Lansman twists the testimony in this proceeding. It points to testimony about a hypothetical program by Martin Luther King. A fair reading of that testimony is that the St. Louis station would not carry a regularly scheduled program by Reverend King if it was designed

[781]

primarily to raise funds to support the activities of CORE in the state of Mississippi, but that the station would consider an occasional program of that nature. Citing transcript page 343, Milam-Lansman asserts that CFC would not carry certain programs on racial matters "unless the rules required". That portion of the record deals with the carefully phrased question about one of the most controversial organizations imaginable - The Black Moslems (who incidentally advocate segregation not integration). The response viewed fairly stands for the proposition that the station would not seek out extremists to create controversy where no controversy really exists, but if there was a legitimate current issue pending the station would present all viewpoints including those viewpoints of an organization such as the Black Moslems [Tr. 343-45]. The most inexcusable and unfound charge by Milam-Lansman however, is that CFC would emphasize on the proposed station its own activities and aims. This simply is not the case. As stated, supra, CFC's church, school and station will be separate. There will be no soliciation of funds on the station for either the church or the school [CFC Findings of Fact, page 11]. The Commission need do no more than examine the proposed programming schedule of CFC to uncover that there will be many religious programs on the station by various faiths and that only a minor portion will be produced by CFC's church [CFC Proposed Findings, pages 30-39]. The programs in education, some of which will be produced by teachers in CFC's schools, will deal with education, and as stated, supra the student body of CFC's schools contains students representing twelve different religious denominations and no effort is made in the schools to persuade anyone respecting his religious beliefs.

To summarize, Milam-Lansman in their Opposition do not challenge CFC's showing that this case should be reviewed by the Commission to outline the obligations of its Review Board in deciding comparative cases in a manner consistent with the Commission's objectives set forth

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in its above-referenced Policy Statement, nor does it successfully refute the record evidence set forth by CFC in its application for Review establishing that a grant of CFC will better provide for the two primary objectives of the Commission in deciding comparative cases. Its references to the record fail to refute CFC's preferences in the individual categories of comparison or the two primary objectives of the Commission sought by those areas of comparison - maximum diffusion of control of mass media and best practicable service to the public.

Wherefor, in view of the matters set forth in CFC's Application for Review and in this Reply, it is respectfully submitted that the Commission accept the Application for Review, order the filing of the briefs, schedule oral argument, following which it should issue a Decision reversing the Review Board, granting the application of CFC and denying the mutually exclusive application of Milam- Lansman.

Respectfully submitted,
CHRISTIAN FUNDAMENTAL CHURCH

/s/ Leonard S. Joyce

* * *

DATE: March 7, 1967

[784]

FCC 67-644
0328

ORDER

Adopted June 7, 1967

; Released June 8, 1967

By the Commission: Chairman Hyde absent; Commissioner Johnson not participating.

1. The Commission has under consideration: (a) an application for review of the Review Board's Decision, 66R-512, 6 FCC 2d 198,

[784]

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released December 28, 1966, filed January 27, 1967, by Christian Fundamental Church; (b) comments of Broadcast Bureau on application for review filed on February 8, 1967; (c) opposition to application for review filed February 13, 1967, by Lorenzo W. Milam and Jeremy D. Lansman, a Partnership; and (d) reply to opposition filed March 7, 1967, by Christian Fundamental Church.

2. IT IS ORDERED, That the application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple
Secretary

[1037]

CHRISTIAN FUNDAMENTAL CHURCH STATEMENT
IN SUPPORT OF INITIAL DECISION AND
LIMITED EXCEPTIONS TO INITIAL DECISION

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[1049]

EXCEPTION 10

To the Hearing Examiner's rulings at transcript page 570 receiving in evidence Milam-Lansman Exhibit 16 and overruling objections thereto by Christian Fundamental Church and the Broadcast Bureau for the Exhibit is not relevant or material to any issue herein and although it purports to be a binding contract it is of no legal effect and in addition one of the persons signing was incompetent to enter into a binding agreement.

154-A

EXCEPTION 11

To the Hearing Examiner's rulings at transcript page 571, 577, 578, and 583 which sustained objections to questions by counsel for Christian Fundamental Church in his cross-examination of a witness, herein, since all such questions were relevant and material to the site availability issue, herein.

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[1098]

154-B

[1098]

[Received Jan. 27, 1967 - FCC]

APPLICATION FOR REVIEW

Christian Fundamental Church (hereinafter "CFC"), by and through its attorneys and pursuant to Section 1.115 of the Commission's Rules and Regulation, files this Application for Review of the Decision of the Commission's Review Board (FCC 66R-512, released December 28, 1966), denying the above-captioned application of CFC for a new FM station at St. Louis, Missouri, and granting the mutually exclusive application of Lorenzo W. Milam and Jeremy D. Lansman, a partnership (hereinafter referred to as "Milam-Lansman").

Review of this proceeding is imperative to enable the Commission to set forth the obligation of its Review Board to decide comparative cases in a manner to insure compliance with the ultimate objectives set forth by the Commission in its "Policy Statement on Comparative Broadcast Hearings"^{1/} (hereinafter, "Policy Statement"). Moreover in so doing the Commission will appraise future applicants

^{1/} 5 Pike & Fischer, RR 2nd, 1901.

[1099]

in the broadcast industry of the effect of the Commission's Policy Statement upon apparently conflicting case precedent. Finally, failure to review would not only result in gross injustice to CFC, but would sanction and create a precedent which would spawn future injustices and play havoc with proper implementation of the Commission's Policy Statement.

Upon review the Commission should accept this Application for Review, order submission of briefs, schedule oral argument, following which it should reverse the Review Board, grant the application of CFC and deny the application of Milam-Lansman.

The important factors which warrant Commission consideration are:

1. The action of the Review Board is in conflict with the Commission's Policy Statement and case precedent.
2. The Review Board's erroneous application of the Commission's Policy Statement, which results in preferring non-residents over long established local residents, presents a question which has not previously been resolved by the Commission, considering the circumstances in this case.
3. The Review Board's erroneous application of the Commission's Policy Statement, resulted in assigning undue importance to the proposed integration of Milam-Lansman, considering that the only principal of that applicant who intends to become integrated will be the Chief Engineer of the station, thereby precluding full-time managerial functions.
4. The Review Board's Decision contains erroneous findings as to important and material questions of fact, and fails to find other important, material findings of fact.
5. The Review Board's Decision is against the weight of the evidence in this proceeding.

THE COMMISSION'S POLICY STATEMENT

The primary objectives of the Commission's Policy Statement are best stated by the Commission clearly and unequivocally: to provide the best practicable service to the public and to achieve maximum diffusion of control of the media of mass communication [Policy Statement, supra, at 1908]. The Review Board in this Proceeding,

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however, ignores those ultimate objectives, and by its unrealistic and erroneous evaluation of each category of comparison, awards its decision to the applicant who will neither provide maximum diffusion of control of mass media, nor the best possible broadcast service. The Review Board did not use the Commission's guide lines: it abused them. It merely gave lip service to the guide lines, and misread the Commission's Policy Statement to arrive at its Decision.

BEST PRACTICABLE SERVICE TO THE PUBLIC

Both with respect to (1) overall evaluation of the applicants under this category, and (2) an examination of each, respecting the several factors which the Commission deems significant in determining which applicant provides the greater assurance of meeting the needs of the public, and remaining flexible to change as local needs and interests might change, the Record compels the conclusion that Christian Fundamental Church must be preferred.

Full-Time Participation in Station Operation by Owners

It is this factor that the Review Board grounded its Decision. As will be set forth infra, Commission Review will disclose that in so doing, the Review Board relied upon errors of fact, and law, and failed to find other important material and, indeed, decisional findings of fact. Moreover, the Review Board misinterpreted the letter and the spirit of the Commission's Policy Statement in this category. A comparison of the proposed participation of the applicants dictates that CFC be preferred.

Respecting this factor of comparison, the Commission notes that it is inherently desirable that legal responsibility and day-to-day performance be closely associated. Additionally, it concludes that there is a likelihood of greater sensitivity to area's changing needs and of programming designed to serve those needs, to the extent that the station's proprietors actively participate in the day-to-day

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operation of the station. The Commission looks for substantial amounts of time to be devoted on a daily basis by the owners in important roles in management, and assigns particular weight to such positions as general manager, station manager, program director. The Commission does not list participation by engineering personnel as of any significance. Further, the Commission looks to such factors as local residence of several years duration, meaningful experience, participation in civic affairs, and other matters indicating a knowledge of and an interest in, the welfare of the community to be served. It declares that among the above, local residence and participation in civic affairs are to be afforded more weight than broadcast experience, for not only is lack of experience remediable, but to place significant weight upon it might discourage qualified new-comers to broadcasting. With these guide lines, let us examine the applicants.

The three principals of CFC, Joseph L. Autenrieth, Eugene L. Maxey, and H. Ralph Hebbelthwaite constitute all of the officers and directors of applicant's non-stock, non-profit corporation. Each has been a long time resident of the community of St. Louis, and each has been actively engaged in civic activities, there. Autenrieth, and to a lesser extent Maxey have had some broadcast experience, but all three have had significant administrative, organizational experience in the conduct of the affairs of the Church and School administered by them. The Church has a membership of 200, while the School, grades kindergarten through 12th, have a total enrollment of 250. Autenrieth will be the general manager of the station, and as chief executive officer will

be the driving force behind the station. [Tr. 298;435] As general manager, Autenrieth will set the overall programming policies of the station; supervise the station's operation; coordinate sales efforts; budget funds for the station; approve

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or disapprove purchases of a major nature; determine rate structures; establish compensation for employees; and otherwise establish policies for the overall operation of the station. Maxey, as station manager will be directly responsible to Autenrieth, and will coordinate the functioning of the various departments of the station. Hebbelthwaite, as program director, will schedule shifts for announcers; implement programming schedules; determine sequence of musical selections; and otherwise supervise the programming of the station. The station's studios will be located in the same building now housing the Church and School. Autenrieth has testified that he will devote his full time to the operation of the station, aside from the two hours per day which he will devote to his responsibilities as pastor of the Church and superintendent of the School [Tr. 387-88]. He did not limit himself, by hours, but testified that other than the two hours set aside for the Church and School, he will devote the remainder of the day to the radio station.[Ibid] Maxey is prepared also to devote significant amounts of time to the station. If necessary, he will assign his teaching duties to other teachers [there are a total of 12 teachers at the school], and devote that additional time to the station [Tr. 393-4]. Hebbelthwaite, presently spends approximately four hours per day in teaching classes at the school [Tr. 432]. He testified that he would be at the station daily to fulfill his duties at the station, noting that the station is foremost in the minds of the principals of CFC [434]. Each of the principals not only will perform their specified duties, supra but each, also, will actively participate in the programming of the station. Since the principals will be working at the premises all day, one or all will be available at all times to deal with station problems as they arise. [CFC Findings of Fact, Paragraphs 15-22; 59-60]

CFC, then, presents a very strong showing respecting this factor.

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There will be complete integration of all three principals in the operation of the station, all of whom are long time local residents, active in civic endeavors, and, therefore knowledgeable of area needs. Moreover, their long time residence and service to the public gives assurance that the Commission may expect permanent residence and permanent devotion to the public interest.

Milam-Lansman are not local. Milam never was, is not now and does not intend to become a St. Louis resident. He proposes no daily participation, whatever in the operation of the station. He indicates that he might spend as much as one-quarter of his time concerning station affairs, but the record is not clear as to what that would be [CFC Finding of Fact, para 23]. Although Mr. Milam proposes to be only a 50% partner, he is putting up all of the investment for the proposed St. Louis station [Tr. 244]. In view of the Policy Statement concerning this factor of comparison, Milam-Lansman can be given no credit whatever for participation by one owner. A demerit even, for where the money lies there also lies control; outside St. Louis with Milam who runs KRAB in Seattle, Washington. Lansman, the other 50% owner, who has no monetary investment at stake was not born in St. Louis, but at some point in his childhood (the record does not disclose the date) he moved to St. Louis with his family and resided there until fifteen years of age when he moved from St. Louis to San Francisco, California with his mother. His only connection with St. Louis, since that time, has been several short visits where he stayed with his father. At this time his father has departed St. Louis, also, and now resides in California. Lansman referred to his several visits to St. Louis as "trips". He has never been employed in St. Louis, he is not a member of any St. Louis organization; his draft board location is in California; his driver's license is from California; and he has made no plans

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where to live if the Milam-Lansman application is granted. He testified that he might well live at the Station. Despite the complete absence of any justification for designating St. Louis as his residence, Lansman did, in fact, on his instant application (dated March 9, and filed March 13, 1964) represent to the Commission that his resident address was 4376 West Minister Place, St. Louis, Missouri-not his residence but his father's home. Lansman testified that on March 9, he was visiting his father in St. Louis and at that time dated the application. This certainly was not giving the correct information to the Commission. Previously, he had been employed at KRAB, and Lansman testified that after dating the application he departed St. Louis and was back working at KRAB prior to the time that Milam-Lansman filed the application. Lansman, at the time of hearing was twenty-two years old (now twenty-four), and unmarried, [CFC Findings of Fact, Para. 24]. Lansman proposes to be general manager and chief engineer of the station-and employ two announcers, one announcer salesman and one part-time secretary announcer. No engineer other than Lansman is listed in the proposed staff. Accordingly, when Lansman is engineer he is not manager and when he is manager he is not the engineer. His managerial responsibilities must be considered reduced by the need for substantial time and attention to engineering duties. Moreover, as discussed, infra, Lansman's primary experience has been in technical work. [CFC Findings of Fact, Para. 61]. He personally proposes to design some of the equipment [M-L Ex. 6]. Lansman's broadcast experience is minimal. As a boy of seventeen or eighteen, he worked for one month at station KBCO after which he sought employment at Station KHOE, Truckee, California; shortly thereafter he was employed at Station KHAI, Honolulu, Hawaii. His combined employment at the last two stations was less than one year. His duties were primarily engineering, although he did do some broadcasting. Mr. Lansman was

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the chief engineer of Station KRAB from December, 1962 (when it went on the air) until September, 1963 when he temporarily left the station and traveled to San Francisco and St. Louis in an attempt to raise money for a proposed FM station in St. Louis, which he considered filing in his own name. Apparently unsuccessful he traveled to Florida, and in early 1964 returned to KRAB and remained there until July, 1964, when he traveled to New York City and then later to Europe returning to Washington, D.C. in September 1964. He remained in Washington until the hearing in the instant case commenced in December, except for a short trip to St. Louis to take a programming survey after the application had been set for hearing. At KRAB Lansman considered himself a semi-volunteer and received no salary. He lived on a houseboat with Milam, and drew as little money as possible for his subsistence. Mr. Lansman admits that he has no sales experience and yet he proposes to be general manager of the commercial station [CFC Findings of Fact, Para 24]. Finally, there is the question of Lansman's attitude as it reflects upon his qualifications to run the proposed St. Louis station. There can be no doubt that he has a carefree philosophy, ie. - I really did not consider my job at KRAB as "employment" [Tr. 132; [after five to six months work at KRAB] -- I was completely tired from working at KRAB [so I took a vacation] [Tr. 148-9]; -- I am not concerned with time, usually [Tr. 136]; Lansman's alleged knowledge of St. Louis needs, at the time of the hearing were the same as he found them to be when he left St. Louis at the age of fifteen [127-7]; etc.

Comparing CFC with Milam- Lansman, therefore, under the guide lines set forth by the Commission in its Policy Statement, respecting the factor of integration of station owners, CFC merits a substantial preference. Respecting local residents each principal of CFC has lived, breathed and had his very being in St. Louis for many years.

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Milam-Lansman are not local. Lansman's promised local residence must be accorded less weight than CFC present residence of many years duration [Policy Statement, at page 1910]. Each principal of Christian Fundamental Church has been active in civic activities, demonstrating a knowledge of and interest in the welfare of St. Louis; Milam-Lansman have had no civic participation in St. Louis affairs whatever. All three principals of CFC will hold the top policy making positions at the station - general manager, station manager, program director. Autenrieth, who will be the driving force behind the station proposes real hard core participation in the operation of the station. Also, as stated, supra, Maxey and Hebbelthwaite will participate, in the day-to-day operation of the station. Combined, the three principals give positive assurance of more than just one man's full-time participation in station affairs by owners. Milam will offer no local participation in the proposed Milam-Lansman station. Lansman will divide his time between managing and engineering, and as set forth, supra, the latter is of little significance. Moreover, this "bare" integration (no local residence, no civic participation, no managerial experience, no sales experience) is found light in the balance. Respecting broadcast experience, Autenrieth, and to a lesser extent Maxey, have had broadcast experience and while not extensive, this experience coupled with all other factors herein is a factor to be considered. As stated, supra, Lansman's broadcast experience has been mostly technical, and this record is devoid of any managerial or sales experience. As the Commission has stated in its Policy Statement, broadcast experience will be deemed only of minor significance, and this is especially true when the experience has been only technical in nature.

The Review Board's Decision, respecting integration fails to find many of the facts as outlined, supra, misread and misinterprets the

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Commission's Policy Statement. It concludes that neither Autenrieth, nor Maxey, nor Hebbelthwaite can devote "substantial amounts of time on a daily basis" to the operation of the station. This simply is not true. As stated above Autenrieth can, and his testimony properly weighed establishes that he definitely intends to, fully participate in the operation of the station on a day-to-day basis. All but two hours of his day can and will be devoted to managing the station. Maxey and Hebbelthwaite, also, intend to devote substantial amounts of time on a daily basis to station operation. All three will broadcast on the station. Combined, the three will devote far more time to the station operation than Lansman alone could devote, even if he did not have to build, operate and care for the equipment. At Paragraph 18, the Review Board correctly reflects the record when it notes that Autenrieth, Maxey, and Hebbelthwaite are sincere in effectively devoting their time to the day-to-day operation of the station. It is in gross error when it (the majority of the Review Board) concludes that there is "serious doubt" that they can or will do so. "Serious doubt" is not a finding of fact, nor a conclusion but a speculation, a luxury foreign to judicial determination. The record is clear that there will be day-to-day participation by CFC's owners. The Review Board somehow ignored that evidence. The Review Board claims that since CFC will hire an experienced broadcaster as an assistant, its doubt as to time availability is strengthened. [Review Board Decision, Footnote 15]. This is a non-sequitur. No managerial duties will be delegated to the experience broadcaster. [Tr. 39-10; 377] While Autenrieth and Maxey do have some broadcast experience, it is only natural, and indeed expected by the Commission that licensees should hire a staff with broadcast experience. This it proposes to do. Respecting the participation of Milam-Lansman, correctly, the Review Board gives no credit whatever to Milam. Having done so, however, it

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seems to "convert" Lansman into a 100% owner. It awards Lansman an almost perfect rating. It fails to consider that if Lansman is a good engineer he will be busy most of the time with the technical operation of the station, for which little credit may be given. Further it boasts of Lansman's past broadcast experience and past and future local residence. As stated, supra, Lansman's past broadcast experience is minimal. His past local residence is meaningless, for it ceased at age fifteen, and as stated, supra, future local residence is of far less weight than long time residence shown by CFC. Why does the Review Board fail to find or conclude that Lansman has no record whatever of civic participation in St. Louis organizations? And why does it fail to take into account record evidence as to Lansman's youth, his lack of any sales experience, his lack of management experience, his history of short periods of employment interspersed by vacation, supra, and the fact that Lansman has no financial investment in the station? Who will really make the important decisions, Lansman, a non-resident, who told the Commission he was a resident of St. Louis, or Milam who holds the purse strings.

The cases cited by the Review Board do not support its unbelievable preference. In Veterans Broadcasting Company, Inc., 4 Pike & Fischer RR 2nd 375, there was involved mutually exclusive applications for a new Television station. In that case, the Commission did not prefer an applicant who proposed substantial participation in the station, where the controlling stockholder of that applicant had been in retirement for a 13 year period, who, as licensee of an AM station delegated great authority to a hired general manager, and kept up with the operation of the station by reports from that manager, rather than "on the scene" supervision. Here CFC proposed nothing indefinite. Each principal will perform his specific managerial duties at the station every day. Moreover, in Veterans, the Commission, stressed

[1109]

that meaningful integration required "presence on the scene" by persons in authority on a day-to-day basis, and that is exactly what CFC offers the Commission. In Charles Vander, 8 Pike & Fischer RR, 2nd 427, the preferred applicant, although not local, would be 100% integrated. The losing applicant had a local majority stockholder who proposed to be the manager of an AM and FM station in a different community and yet claimed that he would be the general manager, also, of the TV facility being applied for. Correctly the Review Board held that he could not be full-time at all three stations, and therefore discounted somewhat his proposed participation at the TV station. Here CFC's principals are engaged in no activity outside the premises of the studios, each will be-on the scene at all times, and they all will participate in station's operation. Grand Broadcasting Company 2 Pike & Fischer RR 2nd 327, cited by the Review Board, strengthens the position of CFC. There, the Review Board indicated that it would look to qualitative integration as well as quani-integration, indicating that greater preference would be given to positions held by owners such as general manager, station manager, and program director, than would be afforded to a Chief Engineer, even if the Chief Engineer represented a substantial stockholder of an applicant. CFC's principals will each be engaged in the three top management positions; Lansman, as stated, supra, will divide his time between management and engineering.

Proposed Program Service:

In its Policy Statement, the Commission specifies that decisional significance will be accorded planning and proposed programming only to material and substantial differences between applicant's proposed programming plans, which must go beyond ordinary differences in judgment.

It is respectfully submitted that in this proceeding the program

[1108]

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It is respectfully submitted that in this proceeding the program

[1110]

proposals are marketly different (which the Review Board concedes, at paragraph 21 of its Decision). CFC will fulfil a demonstrated need, and, since, for years it has shown devotion to local interests, especially education the Commission has assurance that it will continue such local public service on its station. Milam-Lansman deserves a strong demerit for the complete absence of planning and for the nature of the program fare it proposes to broadcast. There was a programming issue in this proceeding and the Hearing Examiner did give a preference to CFC (although not on the grounds advanced, supra) [Initial Decision, Para 8 of Conclusions]. It is submitted that review is warranted so the Commission may have available to it an additional comparison which will enable it to determine which applicant will better serve public interests and give assurance of flexibility to meet needs as they change.

Christian Fundamental Church's plans for applying for a broadcast station at St. Louis, Missouri dates from 1957 and steps looking toward that end commenced in that year. For years, CFC has had a radio survey department which investigated into the desires of the listening audience for a new station such as that proposed by CFC and surveyed such matters as the number of listeners to a program broadcast by Autenrieth. In 1963 when plans were firmed up for the filing of the application, but prior to preparation of the application, Autenrieth made formal and informal contacts with area residents. These investigations, coupled with the long time local residence and the daily contact of CFC principals with area residents arising out of its service to the public in the fields of religion and education made CFC peculiarly sensitive to local needs and desires and its application was designed to meet those needs. Not only will CFC program to meet what it has found to be the needs but each principal will actually broadcast on the station. [CFC Findings of Fact, Para 16-19;

[1111]

25-29] An examination of the programs proposed by Christian Fundamental Church disclose not only that it will devote an unusually high percentage to educational programs, but that practically all such programs will be of a local nature, and produced by local schools. This is the exceptional need over and above what the Commission might normally expect from an applicant, to which CFC points in seeking a preference in this category [Ibid, Para 35]. Moreover, in view of its familiarity with the area, long residence, and specific program contacts, there exists assurance that a positive diligent and continuous effort will be made to meet changing needs [Grand Broadcasting Co., 3 Pike & Fischer, RR 2nd 779, 787].

Milam-Lansman's program planning was nil. As stated above neither are local residents, neither have any membership in any St. Louis clubs or organizations, and despite this, the record is barren of any contacts prior to the filing of the Milam-Lansman application. Lansman claimed that he visited St. Louis for a short time in 1961 and 1963 respecting the application, but on cross-examination it was disclosed that the purpose of the 1963 trip was merely to investigate into the possibilities of raising funds [Tr. 146, 148]; the 1961 trip which appears to have been of short duration was not only too removed in time from the filing of the application (1964) but at the time Lansman was only eighteen years old. At any rate, there is no record evidence as to whom if anyone, Lansman spoke concerning program during that visit. After the application was filed Milam-Lansman did make contacts but the Hearing Examiner correctly noted that the effect of this could only be to "shore-up" the Milam-Lansman case prior to hearing [Initial Decision Paragraph 6 of Conclusions]. What is apparent on the record, is that approximately 50% of the programming on the St. Louis FM station (if Milam-Lansman were to prevail), would be similar to that presently broadcast by radio station KRAB, Seattle, Washington

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and that certain specific KRAB programs would be broadcast on the St. Louis station [Ibid, Para 40]. Summing up then, what we have is no meaningful planning until after the application was filed, by two Seattle, Washington residents who propose what they thought might be needs in St. Louis. This fails so far short of their responsibilities to reasonably obtain knowledge of the community and area in order to show that the program proposals are designed to meet the needs and interests of the public in the area. The Commission should award a "serious deficiency" to the Milam-Lansman proposal in this regard [Policy Statement, at page 1911].

Past Broadcast Record:

Under its Policy Statement, the Commission examines past broadcast records which because unusually good or unusually poor give some indication of unusual performance expected in the future [Policy Statement, at page 1912].

CFC has never had an ownership interest in a broadcast station. Therefore, they have no record in this regard.

Milam has an ownership interest in, is the founder of, and controls the operation of Station KRAB, Seattle, Washington. Lansman has worked at the station, has gained most of his limited broadcast experience at that station, and, approximately 50% of the programming of the St. Louis station will be similar to that of KRAB; certain programs of KRAB will be rebroadcast on the St. Louis station [CFC Findings of Fact, Para 40]. Considering these premises it is respectfully submitted that the Commission, by examining the programs of KRAB will gain an indication of the performance it can expect from the St. Louis FM station if it were to be granted to Milam-Lansman. It is respectfully submitted that that performance is very poor and that the Commission should consider this to be a severe deficiency in the Milam-Lansman proposal. There is insufficient space in this Application for Review

[1113]

to go into great detail respecting the poor broadcast record of KRAB. If this Application is granted detailed information will be set forth. It is sufficient here briefly to touch upon the nature of that operation. The station is located in a converted donut shop; it employs only two paid staff members; it carries no regular scheduled news broadcasts - local, regional, national or international; it has no wire service; it is a part-time station, with no afternoon programming and its morning programming is merely repeats of previous evening broadcasts. Programs broadcast in the past include: A discussion in some detail of sexual disappointment by either or both men and women; a program entitled "Divorce and Trial Run Marriage"; "From Infra Red to Infra Blue"; "Madeline Murray and her First of two Programs about her Militant Atheism". Words such as "damn" and "hell" are acceptable for broadcast at KRAB. Mr. Milam testifies that words such as "hell, damn and damit" would be broadcast over the Milam-Lansman St. Louis station. He indicated further that KRAB would have no objection to and that there would be no objection to broadcast by the Milam-Lansman St. Louis station of such words as "whore", "slut", and "pimp", if contained in a literary work of art although he said such programs would be carried in the late evening. [CFC Findings and Fact, Paras. 40-44].

It is respectfully submitted that such programming philosophy cannot be squared with the public interest and in its brief and oral argument, these matters will be discussed in greater detail. Of course, the record is before the Commission for independent investigation at this time.

Efficient Use of Frequency:

In its Policy Statement the Commission indicated that in comparative cases, the question of efficient use of the frequency can and should be considered in determining which applicant should be preferred.

In this proceeding, the Hearing Examiner concluded, correctly,

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that CFC is entitled to a "substantial preference" in this regard.^{2/}
The Review Board errs in reducing this preference. There is no dispute that CFC will serve in excess of more than 47,000 persons than will Milam-Lansman. Moreover the margin would be far greater if Milam-Lansman were unable to construct a 56 foot extension of an existing tower atop the Continental Building in St. Louis, Missouri.

Additionally the facts are not in dispute that CFC would provide a third primary FM service to more than 23,000 persons than would Milam-Lansman. Considering, therefore, the presumptive need for service for under-served areas, CFC is entitled to a substantial preference respecting efficient use of the frequency [WNOW, Inc., Pike & Fischer RR 2nd 875]. The Review Board, in diminishing the preference, relies upon Armin J. Whittenburg, Jr., 19 Pike & Fischer RR 775. The case is not in point. In Whittenburg, all areas received no less than 11 other FM broadcast services while here, substantial areas receive but two other FM broadcast services. Therefore, here, there is shown a presumptive need for the greater third service areas to be served by CFC [WNOW, Inc., supra].

MAXIMUM DIVERSIFICATION OF CONTROL OF MEDIA OF MASS COMMUNICATIONS

In its Policy Statement [Pages 1908-9], the Commission indicates that one of its two primary objectives toward which the process of comparison should be directed is the maximum diffusion of control of the media of mass communications. It considers it to be a primary objective of not only comparative hearings, but, of its entire licensing scheme as well [Ibid].

Christian Fundamental Church has no interest, whatever, in any media of mass communication. Accordingly it makes a perfect showing under this category.

^{2/} [Initial Decision, Para 3 of Conclusions].

[1115]

Milam, the 50% owner of Milam-Lansman has an interest in, was the founder of, and now manages and controls the operation of Station KRAB, Seattle, Washington. Seattle is rated as the 21st market by ARB. Some of the programs of KRAB will be broadcast on the St. Louis station and approximately 50% of the St. Louis station's programs proposed by Milam-Lansman would be of the same nature of those broadcast at KRAB. St. Louis is rated as 12th market by ARB. Considering the size of the Seattle and St. Louis markets as well as the similar programs which would be broadcast in those two major markets by Milam-Lansman, Christian Fundamental Church is entitled to a strong preference in this category.

SUMMATION

Review of the Decision, herein, is vital not only to Christian Fundamental Church, but to administrative due process in general. In its Decision, the Review Board not only made errors respecting material findings of fact and law, but it lost perspective in applying the record evidence, to the guide lines promulgated in the Commission's Policy Statement; improperly weighed comparative factors within those guide lines; and arrived at an improper Decision, not only at odds with the guide lines, themselves, but with the objectives of the guide lines. Such a Decision warrants Review by the full Commission.^{3/}

The objectives of the Commission's Policy Statement are clear: Best practicable service to the public and maximum diffusion of control of media of mass communications. The preference respecting the latter is clear; Christian Fundamental Church has no interest in any media of mass communications. Milam-Lansman have an interest in Station KRAB

^{3/} Farragut Television Corporation, FCC 66-1189, released December 29, 1966.

[1116]

Seattle, Washington, and if its instant proposal were to be granted, it would control an FM station in two cities, St. Louis and Seattle, each of which are among the top twenty-five markets in the country. Respecting this primary objective, therefore, Christian Fundamental Church merits a substantial preference.

The other primary objective - best practicable service to the public, is deemed of importance, for the factors to be investigated under this category, properly weighed, permits the Commission to determine which applicant gives greater assurance of meeting the needs and remaining flexible to the changing needs of the public in the area to be served.

Comparing the applicants, in each factor of this category, with the ultimate objectives in mind, leads to the inescapable conclusion that CFC is better qualified than Milam-Lansman. Respecting full-time participation in station operation by owners, CFC by its long time, local residence, active participation in civic affairs, years of service to the public in the field of education, and complete, active, on-the-scene participation in the day-to-day operation of the station, presents to the Commission a great likelihood of sensitivity to the needs of the area on a permanent basis. Only one of the two principals of Milam-Lansman will be engaged in the day-to-day operation of their proposed station, thus immediately reducing by one-half any consideration under this factor of comparison. Lansman will divide his time between managing and engineering. He represented to the Commission in the Milam-Lansman application that he was a resident of St. Louis, when he knew he was merely visiting his father, and, indeed, he returned to Seattle before the application was filed. No amount of words will change this uncontroverted fact. He belongs to no St. Louis clubs or organizations, he has demonstrated no knowledge of St. Louis needs; he has none of his own money at stake, and Milam, the backer of

[1117]

the station, who will remain in Seattle, undoubtedly will enforce his will respecting important policy decisions at the station. Lansman, offers the Commission, only, his engineering qualifications together with a slight amount of background in broadcasting. Although he will be engaged in the day-to-day operation of the station, he simply does not provide the same likelihood as does CFC of programming the station to meet and remain flexible to the needs and interests of the area residents on a permanent basis. The program service of CFC was based on its knowledge of the area, and program contacts both before and after the filing of the application. It proposes many local programs, and demonstrates an unusual public service especially in the field of basic, down to earth, understandable education. Milam-Lansman's preparation before the filing of the application was nil, and its programming schedule, by and large the same format carried at KRAB, has not been shown to contain programming for which there is any need or desire in St. Louis. Moreover, an examination of the operation of KRAB gives rise to serious doubts that the Milam-Lansman programming can be squared with the public interest. Here again CFC makes a much stronger showing than Milam-Lansman. CFC has no past broadcast record. The broadcast record of KRAB is poor and should be found by the Commission to be a severe deficiency. Respecting efficient use of the frequency, CFC provides not only greater service, but substantially more service to under-served areas. Its preference in this regard is important and should be given substantial weight.

One additional matter must be noted. The instant applications were before the Commission earlier, and by action of the Commission (FCC 66-652, released July 22, 1966) the Review Board was reversed and the case remanded. The Review Board has thought that there was not a reasonable assurance of site availability for Milam-Lansman, but no other matter was then considered by the Review Board or Commission.

[1118]

The Commission is requested to review the Decision in this matter in the consideration of the whole case which is now before it, including the site issue. The Board, in its Decision after remand was obliged to make a specific determination as to the final disposition of the site issue, as an element of its Decision; failure to do so was a defect in its Decision.

Milam-Lansman has failed to meet the burden of proof on the issue of site availability because Milam-Lansman's site is 116 feet above the roof, and, in order to use the site it would be necessary for it to build a substantial structure on top of the Continental Building in St. Louis. CFC does not have to build such a structure to comply with its proposal. This structure of Milam-Lansman would have been a guyed tower 116 feet up above the building. There was no evidence of any authorization from the owners of the building or, from the city, or from the FAA. There was no showing that the structure could be built and there was no engineering of the project presented. This is very important to CFC. CFC with much more power than Milam-Lansman would cover much more of the area than Milam-Lansman if each should operate from the same height above ground, but the difference of an added 116 feet makes up for a part of the loss of Milam-Lansman in population, so that if Milam-Lansman cannot build an additional 116 foot tower on top of the Continental Building, as we believe, CFC will have lost a very important position in the presentation of this Application to the Commission, and, the Commission will have decided the case without considering the marked disadvantage that Milam-Lansman would have had without the extra 116 feet above average terrain. In this connection, therefore, it is shown that Milam-Lansman did not meet his burden of proof with respect to the issue against it on site availability.

The Commission is requested to consider the objections presented

[1119]

at the hearing in this matter with respect to the introduction of testimony supporting the use of the Continental roof top. There was no indication that the owners would allow the building of such a substantial structure or

that the city would permit it, or that the FAA would give authorization for such a structure. Milam-Lansman failed to introduce evidence showing exactly what the tower would look like, its availability, or any engineering in connection therewith; and the qualifications of a Miss Tucker to speak and bind the owners of the building to any agreement or the use of the building, particularly when her own evidence stated she would be required to get authorization from the owners of the building, and from the city to build such a structure, were not established. The introduction of testimony concerning a "lease option agreement" must fail for vagueness.

For these and other reasons advanced before the Commission by CFC, in this proceeding, the Commission's Decision in this matter must be reversed. [Review Board Decision, FCC 66R-135, released April 6, 1966; CFC Opposition to Application for Review, filed June 7, 1966]

All things taken together, properly weighed, and considering all record evidence, the conclusion must be reached that CFC and not Milam-Lansman gives the Commission the greater assurance of providing the best practicable service to the residents in and around the community of St. Louis.

Therefore, in view of the foregoing it is respectfully submitted that the Commission accept this Application for Review, order the filing of briefs, schedule oral argument, following which it should issue a decision reversing the Review Board, granting the application

[1120]

of CFC and denying the mutually exclusive application of Milam-Lansman.

Respectfully submitted,
CHRISTIAN FUNDAMENTAL CHURCH

/s/ Leonard S. Joyce

* * *

Date: January 27, 1967

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[Tr. 90]

CROSS EXAMINATION OF JEREMY LANSMAN

BY MR. JOYCE:

* * * * *

Q. What was your salary at KRAB? A. The compensation that I received at KRAB was dependent on my needs. There was no fixed salary for myself. I would consider myself to be a semi-volunteer and I only asked for the money that I needed to continue my own maintenance.

Q. Were you a part-time employee, or a full-time employee?

[Tr. 91]

A. I worked on an irregular schedule, but I believe it would total out to more than 40 hours a week, on an average.

* * * * *

[Tr. 126]

* * * * *

Q. Mr. Lansman, you indicated that you had reached certain conclusions as to the programming needs of St. Louis when you were 15 years of age; is that correct; in your direct testimony?

[Tr. 127]

A. I believe I stated that I -- will you direct me to the page, so I can see what I stated in my testimony?

Q. Exhibit 7, page 2; counting full paragraphs, the third paragraph of that page. A. Yes. I reached certain conclusions about the needs of St. Louis at that time.

Q. And the needs that you now know or claim them to be are about the same as they were then? A. They have changed but, substantially, the needs are the same.

PRESIDING EXAMINER: I don't understand that question or answer, when you are talking about "then" and "when".

MR. JOYCE: Then; when he was 15 years old.

PRESIDING EXAMINER: And now?

MR. JOYCE: When he is 22.

PRESIDING EXAMINER: He had conceived ideas when 15 years old and they exist now when he is 22?

THE WITNESS: I still have ideas as to the needs of the community. Although these ideas have changed somewhat, I am stating now they are in many respects substantially the same.

BY MR. JOYCE:

Q. To use your words, they are "about the same".

MR. BADER: Excuse me, Mr. Examiner. Was that a question?

PRESIDING EXAMINER: I was wondering.

[Tr. 128]

MR. JOYCE: I thought I heard an answer.

PRESIDING EXAMINER: He did not answer.

THE WITNESS: I will say "yes".

* * * * *

[Tr. 140]

* * * * *

CROSS EXAMINATION (resumed)

BY MR. JOYCE:

Q. Mr. Lansman, did you have an opportunity to refresh your memory as to your residence from the time you moved to San Francisco with your mother up until the present time? A. I have been able to do so to a degree, although I haven't finished in placing it as accurately as I can, the dates. There are certain specific dates, in other words, that I can give you now.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

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[Tr. 128]

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PRESIDING EXAMINER: He did not answer.

THE WITNESS: I will say "yes".

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[Tr. 140]

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CROSS EXAMINATION (resumed)

BY MR. JOYCE:

Q. Mr. Lansman, did you have an opportunity to refresh your memory as to your residence from the time you moved to San Francisco with your mother up until the present time? A. I have been able to do so to a degree, although I haven't finished in placing it as accurately as I can, the dates. There are certain specific dates, in other words, that I can give you now.

Q. Would you give us what you have at this time, please? A. Yes. I arrived in San Francisco from St. Louis to live with my mother at the age of 15. To that extent I have clarified that date. The dates which I have recorded in the application were derived from a record kept on the back of my license and are, therefore, correct. In other words, I began

[Tr. 141]

employment at KBCO the third month of 1961. This terminated at the end of the fourth month of 1961 and my employment with KHOE began on the first day, in fact, of the fifth month of 1961.

Q. Excuse me. That would be May 1, 1961, you began working at KHOE? A. Yes.

PRESIDING EXAMINER: How old were you then? Aren't those dates wrong that he is giving us, if he was 15 years old and all of a sudden we are in 1961?

MR. BADER: Mr. Examiner, as I recall the original testimony, the first thing he said this morning, he stated his age when he arrived in San Francisco but he didn't state the year.

PRESIDING EXAMINER: Let's start over on this thing again. Maybe my mathematical calculations are not right, maybe they are, but let's start again. All right.

BY MR. JOYCE:

Q. At the age of 15 you went to San Francisco. You were born in 1942 toward the end of the year. A. That is correct.

Q. That would mean, if you moved and you were 15 and it was not yet November of that year-- A. As you remember, I told you it was toward the end of the year when I moved to San Francisco so I am fairly

[Tr. 142]

certain that was close to the date when my birthday came up and I specifically remember being 15.

Q. Then that would make it 1957? A. Yes.

Q. Now we have to account for three and three-quarters years between your move to San Francisco and your employment at KBCO.

A. During this period I was going to school continuously.

PRESIDING EXAMINER: That is from 1957 to 1961?

THE WITNESS: Other than several months preceding my employment at KBCO.

PRESIDING EXAMINER: When was that?

THE WITNESS: That was in 1961.

PRESIDING EXAMINER: All right.

BY MR. JOYCE:

Q. And then where were you for those several months you just mentioned? A. I was seeking employment and I believe that is the period during which I acquired my first class license. You have that date.

Q. Then KBCO for the third and fourth month of 1961, then KHOE commencing May 1961, and when did that employment terminate with KHOE? A. Now, let me explain that KHOE and KHAI were a

[Tr. 143]

common ownership. Therefore, I did not record the exact date of leaving one station and moving to the other. In fact, I was somewhat in control of the engineering station at both stations simultaneously.

Q. Well, you did physically leave KHOE, however, to go to Honolulu? A. Yes.

Q. Do you recall when you physically left? A. I haven't determined the exact date. I prefer to leave that open until I get to it. In fact, I made a trip in that period to Camden, New Jersey, in which I stopped at St. Louis for several days to visit with my father to purchase equipment for KHAI, a trip to St. Louis which I believe I didn't remember at the time I was drawing up my written direct testimony. But I haven't been able to fix the date.

Q. That trip was for three days, you say? A. Approximately, I remember it being just a short visit.

PRESIDING EXAMINER: Wait just a minute. KHOE and KHAI you are testifying were under common ownership in 1961?

THE WITNESS: Yes.

PRESIDING EXAMINER: All right.

BY MR. JOYCE:

Q. I am sorry to belabor this, Mr. Examiner and Mr. Lansman. You indicated that you arrived in Honolulu at the

[Tr. 144]

age of 18 so that would have to mean, you were born in 1942 and 18 would be 1960.

PRESIDING EXAMINER: Yes, but his birthday is on November 25, 1942, so he would still be 18 in 1961.

THE WITNESS: I was 18 up until November of 1961.

BY MR. JOYCE:

Q. Then KHAI was certainly toward the end of '61 and into the beginning of '62? A. Yes, that is correct.

Q. Then in that time somewhere in the beginning of 1962 you departed KHAI and traveled for a short time and then secured employment with KRAB? A. Yes. I reported the date of my leaving employment with the person that was responsible for KHOE and KHAI in the first month, I believe it was, as I remember, the end of that month 1962.

Q. And you have the date when you commenced employment with KRAB? A. It was about two weeks after I discontinued employment at KHAI.

Q. So let's say February '62, January and February? A. Yes.

Q. And then you continuously worked there until when? A. I worked at KRAB -- I am going to have to think about this a moment because I haven't been able to arrange my

[Tr. 145]

notes very clearly. I believe that was up until September 1963. I haven't made my note clear enough to be sure that was the date that I left Seattle for San Francisco or not. I have in my notes that I left for St. Louis at that time but the process was this, that I left KRAB, I went to Seattle, I arranged for going to St. Louis and talked to several people.

Q. Excuse me. You left KRAB and went to San Francisco.

A. That is coming close to the time that Milam made his application. He in fact started drawing it up not long after I left.

PRESIDING EXAMINER: Let me get one thing here now. I must say for a man your age you have done a lot of traveling.

THE WITNESS: That is so.

PRESIDING EXAMINER: When did you go to work at KRAB approximately?

THE WITNESS: The early part of February.

PRESIDING EXAMINER: Of 1962?

THE WITNESS: That is right.

BY MR. JOYCE:

Q. Then you stayed there until September '63? A. Yes.

Q. You departed and you went to San Francisco? A. Yes.

Q. How long did you stay at San Francisco? A. I haven't been able to clearly remember. I believe

[Tr. 146]

it was in the area of just a few weeks before I departed from there for St. Louis.

PRESIDING EXAMINER: Let me ask you a question. Did Mr. Milam file an application as an individual for a station at St. Louis?

THE WITNESS: Yes, he did.

PRESIDING EXAMINER: Do you remember when that was?

THE WITNESS: The date is November 12, 1963.

PRESIDING EXAMINER: Then when did you get into this thing as a partnership?

THE WITNESS: I had discussions with Mr. Milam when he visited me in St. Louis while I was making my investigations into raising funds.

PRESIDING EXAMINER: What year?

THE WITNESS: This was at the very end of 1963. This was approaching Christmas.

PRESIDING EXAMINER: After he had filed?

THE WITNESS: This was after he had filed.

PRESIDING EXAMINER: All right. Excuse me, Mr. Joyce.

MR. JOYCE: Fine, Mr. Examiner.

PRESIDING EXAMINER: But I wanted to get a few dates in there.

MR. JOYCE: Mr. Examiner, will you take official notice, please, that Lorenzo W. Milam dated the application which he filed in his own name October 26, 1963.

[Tr. 147]

PRESIDING EXAMINER: Yes.

MR. JOYCE: Thank you.

PRESIDING EXAMINER: Mr. Bader, I have looked at the original there.

MR. BADER: I want counsel to identify the date it was filed and file number and form and all that sort of thing.

PRESIDING EXAMINER: All right.

MR. JOYCE: It was received at the Office of the Secretary of the Federal Communications Commission on November 12, 1963. It was assigned the file number BPH4218 sometime thereafter, the date of which I do not have.

PRESIDING EXAMINER: It looks like the date of the file number, looking at the Commission's official record, is January 17, 1964.

BY MR. JOYCE:

Q. Now, Mr. Lansman, we are a few weeks into September and possibly into October 1963 when you are at San Francisco. Now you then went from San Francisco to St. Louis? A. Yes, I did.

Q. How long did you stay? A. I stayed until I met Mr. Milam preceding Christmas. I can't give you an accurate date there.

Q. Then you returned to KRAB? A. No, I did not. I met Mr. Milam on the 17th of

[Tr. 148]

December. I traveled with him to his home in Jacksonville, Florida, where I spent Christmas with him and his family. During this time we tried to reconcile differences and arrange for some sort of getting together on our purposes in constructing a radio station in St. Louis.

I returned to St. Louis on January 3 of '64 to continue trying to raise funds for my application in St. Louis.

PRESIDING EXAMINER: When did you file your application in St. Louis?

THE WITNESS: I never raised enough money.

PRESIDING EXAMINER: Yours was never filed as a sole proprietorship?

THE WITNESS: No, I did not.

BY MR. JOYCE:

Q. Then having not raised enough money, you returned to KRAB?
A. That is correct.

Q. Would that be in January? A. I arrived in the late part of February of '64.

Q. Then how long did you stay this time? A. I stayed until about July 5, 1964.

Q. Then where did you go? A. I went to New York City.

Q. Was that a vacation? A. I considered it one. I was completely tired from

[Tr. 149]

working at KRAB.

Q. How long did you stay in New York? A. I stayed in New York until July 20.

Q. Then where did you go July 20? A. A few days before July 20 I received a phone call from Lorenzo who was at that time on vacation in London, so I went to London on August 3 -- no, July 20.

Q. As Mr. Milam's guest? A. Yes.

Q. How long did you stay in London? A. Until the last days of July, at which time I went with a friend of mine whom I know in New York and traveled with him towards Germany.

Q. Well, let's put all of Europe together. A. I arrived --

MR. BADER: Mr. Examiner, I object to this line of questioning as irrelevant.

PRESIDING EXAMINER: I am wondering where it is leading us and for what purpose.

MR. JOYCE: Well, Mr. Examiner, obviously the background and experience of the 50 per cent partner is very relevant plus the record is unclear as to exactly the extent of this man's experience, how long he was working at a radio station. The only way I can find out how long he was working at a radio station is to find out what else he did also so when the record

[Tr. 150]

is finished we can add up and say this much time he spent traveling, this time he spent working.

THE WITNESS: Maybe I could clarify.

MR. BADER: Excuse me, Mr. Witness. In view of that explanation of counsel, his last question, which I would like to have read over again, does not bear any relevance to the line of inquiry that he is pursuing.

MR. JOYCE: Unless I misunderstand my last question, it is how long he stayed in Europe.

PRESIDING EXAMINER: He had gone to Germany and Mr. Joyce had said keep it all in Europe.

MR. BADER: Could I have the last question read?

PRESIDING EXAMINER: Yes, sir.

(The last question was read by the reporter.)

BY MR. JOYCE:

Q. When did you come back from Europe? A. I came back approximately September 25 of this year.

Q. To where? A. To Washington, D.C.

* * * *

[Tr. 127]

CROSS EXAMINATION OF LORENZO MILAM

BY MR. JOYCE:

* * * *

Q. How many regular full-time staff members does radio station KRAB have?

[Tr. 218]

A. Paid?

Q. Paid full-time staff members. A. Two

Q. Are you one of those? A. No.

Q. Does radio station KRAB have a wire service? A. No.

Q. What is the address of the station, Mr. Milam? A. 9029 Roosevelt Way in Seattle.

Q. And that is a converted garage, is it not? A. Converted doughnut shop.

Q. Converted doughnut shop?

* * * *

[Tr. 234]

* * * *

Q. Do you carry specific five, ten or fifteen minute programs devoted to national or international news? A. Once again it is a problem of what you mean by "news," because I think commentaries are news sometimes. They are certainly news to me sometimes.

Q. But the program I am interested in hearing about is the one that you and I hear mostly on radio stations where they say "and now the news." A. Right, and "news in depth" or "news bulletins" or something like that. No, we do not carry that.

Q. You don't do any of that? You don't do local, regional or international news programs? A. See, there are exceptions to this, too.

[Tr. 235]

Q. That is in the record.

PRESIDING EXAMINER: Wait a minute. Let me settle this in a hurry. You do not have any regularly scheduled news broadcast in your radio station daily?

THE WITNESS: That is right, we do not.

BY MR. JOYCE:

Q. Would you state the hours of operation of KRAB? A. There are variations but I will try to. From Monday through Friday we are on the air from 10 in the morning until 1 in the afternoon and from 5:30 in the evening to normally 11:30 or 12 at night.

On Saturday we are on the air from 10 in the morning until 1 in the afternoon and from 6 in the evening until 2 or 3 in the morning, Sunday morning.

On Sunday we are on the air usually from about 9:30 in the morning until 1 in the afternoon and then again from 6 in the evening, sometimes earlier, normally until midnight.

Q. Now the morning programming, that is, the programming Monday through Friday 10 to 1, Saturday 10 to 1, Sunday 9:30 to 1, is that a repeat of some of the programming from the preceding day? A. Yes.

Q. And it is a repeat of that programming of the preceding day that is broadcast in the evening hours? A. Yes.

[Tr. 236]

Q. So as far as separate programming is concerned, it commences at 5:30 or 6 in the evening?

MR. BADER: Objection, Mr. Examiner. The term "separate programming" is one defined by the Commission.

MR. JOYCE: I will withdraw the question.

PRESIDING EXAMINER: The question is withdrawn.

BY MR. JOYCE:

Q. During your evening program, do you ever repeat programs previously broadcast by KRAB? A. Yes.

Q. Have you had communists on radio station KRAB? A. We had a communist on.

Q. A communist. Have you had an atheist on? A. Yes.

Q. Have you had a John Bircher? A. Yes.

Q. Have you had a Black Muslim? A. Yes.

Q. Have you had other people holding extreme views? A. I am having a little trouble with definitions here. Extreme views. We have had people with unusual views, yes.

Q. Other than those I have named, give me another example of somebody you would say had an unusual view? A. Well, this will get into specific examples, is that right?

[Tr. 237]

Q. Yes. A. We have had a socialist on the air and we have had, for instance, a commentator who suggested, for instance, that the Government set up a department of population control. We have had young conservatives, you know, conservative in the political sense of the word, very conservative people.

There is such a variety. I can't really answer that without going through the program log.

Q. How about anybody advocating trial marriage? Will you let them on? A. Yes, we had a program on that.

Q. Have you had programs where great latitude is given in the discussion of sex? A. Well, once again we get into words. Great latitude by whose standards?

Q. Well, let me try to be more specific. You have indicated that you had somebody commenting on trial marriages. A. Right.

Q. Actually he advocated them, is that correct? A. I didn't hear that program. Well, I heard parts of it and I seem to recall that that was part of the program, yes. He was speaking of divorce, too.

Q. Would you allow someone on who advocated free love, no marriage at all?

[Tr. 238]

A. It depends a lot on the presentation. If he did a good job, if he was intelligent and articulate, and if he was thoughtful about it, and if he wasn't being sensational, I would let him on.

* * * * *

[Tr. 249]

* * * * *

Q. Mr. Milam, radio station KRAB is supported by subscriptions received from the listening audience, is that correct?

[Tr. 250]

A. Yes.

Q. You do not sell commercials? A. None.

Q. Do you seek subscriptions by an announcement over the station?

A. Yes.

Q. That announcement requests a person to send in their \$12?

A. Right.

Q. Did you consider proposing a subscription-supported station for St. Louis? A. I considered it.

Q. Would you change the station to subscription-supported if you had difficulty in obtaining commercial advertising? A. I don't know.

Q. Mr. Milam, do you live from dividends and interest on security investments, is that correct? A. Yes.

* * * * *

[Tr. 323]

CROSS EXAMINATION OF JOSEPH AUTENRIETH

BY MR. BADER:

* * * * *

Q. How many members are there in the congregation? A. We have many people who worship with us who do not belong to our church. We do not emphasize church membership. To understand the figure that I am going to give, you would have to understand something about the philosophy of the church. But to be specific, 200.

Q. I would like you to have the opportunity to tell us about the philosophy of the church as it bears on that answer. A. We never actively solicit anyone to join the church. To my knowledge, I have never asked anyone specifically to do it in all of my ministering. At the close of the Sunday morning service at the first Sunday of each month, we say, "If there are any who would like to become affiliated with this congregation, we invite you to do so at this time."

If no one comes, fine. This is reflected in the fact that we have 12 different denominations represented in our student body and we don't make an effort to change anybody's

[Tr. 324]

mind about religion. If they want to come because they like our services, fine.

Q. You don't have any membership rolls, as such? A. We do. We have to have.

Q. Is the membership figure of 200 related to the membership rolls? A. Related? That is the membership roll.

Q. A greater number of persons worship on an average Sunday than 200, is that correct, in the congregation? A. In the services, yes.

Q. And can you give us an average figure for a weekly attendance? A. Well, there are a lot of ways to toss those figures around. If you want to know how many people we minister to in a course of a week or how many souls attend divine services in our composite week, we could say something over a thousand. But I think that is a bit misleading.

* * * * *

[Tr. 334]

BY MR. BADER:

* * * * *

Q. What factors entered into your determination to schedule the Tops to Teens program at 9:05 p.m.? A. I might qualify my answer by stating that in the homes of many of the people of evangelical persuasion, television is not a factor. We figured this would be prime time for those who needed to hear this program.

Q. So the program is directed to the children of those of evangelical persuasion; is that correct? A. Yes. And that is a pretty big segment of the population.

* * * * *

[Tr. 345]

* * * * *

Q. It is true, is it not, that the schools of the Christian Fundamental Church in 1964 have been publicly held out as racially segregated?

A. They are not now.

Q. Would you please answer my question? A. Well, 1964 is not over.

[Tr. 346]

Q. From January 1, 1964, until October 15, 1964. Can you confine your answer within that period? A. We were segregated officially.

Q. And on what date were you no longer segregated officially?

A. I cannot give you a specific date, but in the light of the returns of the last election, it became apparent that the policy of segregation in our area was a bit obsolete and outmoded and our Board of Education--

MR. BADER: May I direct the witness --

PRESIDING EXAMINER: Let me ask a question.

He says they are not segregated now. They have been segregated sometime during 1964. What bearing does it have on any issue here, whether they are or are not segregated, and what --

MR. BADER: It has a bearing, in view of the fact that the application was filed and amended with a policy statement at some point during 1964, and I would like to know how the policy statement now stands.

PRESIDING EXAMINER: Is there anything in the policy statement about segregation?

MR. BADER: I have explored that on cross-examination, Mr. Examiner. Yes, sir. There in, in that the representation is made that on controversial issues, all sides will receive equal time.

MR. JOYCE: Mr. Examiner, two points: First, I would

[Tr. 347]

agree that it goes to no issue. The schools are not the applicant here and we know now they are not segregated. The applicant here is the corporate church, and Mr. Bader has not asked the question of whether the corporate church ever engaged in segregation.

PRESIDING EXAMINER: Well, apparently he has not. Apparently he is not concerned with it.

Mr. Bader, I don't think we want to pursue that question. They were segregated at some time, and now they are not. So let's go on.

BY MR. BADER:

Q. Are any members of the staff of the corporate church and the corporate schools negroes? A. No.

* * * * *

Q. In the programs which you have testified will be primarily presented by you, one was the Remote Worship Service between 11 and 12 noon on Sunday. In the presentation of that program, will you actively advocate the propagation of the word of God, as reflected in the policies of your church? A. He is asking me what I am going to preach the rest

[Tr. 348]

of my life. I don't know how I can answer that question. All I can say, Mr. Bader, is that I intend to continue to preach in the future as I have in the past. Whether they are being broadcast or not being broadcast is immaterial. The question is quite broad.

Q. Will the proposed station editorialize? A. I think it should reserve the right to do so.

Q. Do you have any plans for presenting editorial programs on the proposed station? A. I see none in the proposed programming.

Q. Do you have any plans, apart from the proposed programming, for editorial programs? A. At the present time, no.

Q. Will the station make time available for the presentation of political speeches by candidates for public office? A. Absolutely.

Q. I take it, that you have adopted no policy which would govern the possible broadcast of editorial programs, since you don't contemplate at the present time that there will be any? A. I do not contemplate, including or precluding right now.

Q. Have you given the subject any consideration in connection with your consultations with Reverend Maxey and Hebblethwaite?

[Tr. 349]

A. We are still batting it around in our minds.

Q. I take it that the church may present programs which involve roundtable type discussions by candidates for public office. Is that correct? A. That is not correct. You said the church is going to present programs. The station may.

Q. I am sorry. Will the station present roundtable type programs or debate type programs involving candidates for public offices speaking on political issues? A. We anticipate that.

* * * *

[Tr. 351]

Q. What limitations have you placed on religious programming to be carried by the proposed station? A. 20 per cent, roughly.

Q. What do you mean? 20 per cent of what? A. Of the total programming.

Q. Are there any other limitations which you have placed on these programs? A. Certainly, the programs that we carry will have to

[Tr. 352]

be in good taste and produced according to National Religious Broadcasters Association's standards.

* * * *

[Tr. 357]

* * * *

Q. What programs do you plan on a regularly scheduled basis to present opposing viewpoints on subjects discussed in the Temperance Crusade Program? A. Mr. Bader, I have been broadcasting the Temperance Crusader for about eight years on about 15 different radio stations in the Midwest. I have never had anybody ask any station for

time in rebuttal to my statements, for the simple reason I do not enter into the area of argumentation in the temperance crusade. Obviously you have never heard the Temperance Crusade.

Q. What is -- will you describe the contents of a typical temperance crusade?

MR. BADER: Excuse me. Please delete the question.

BY MR. BADER:

Q. In the course of the Temperance Crusade Program, do you urge that individuals not consume alcoholic beverages? A. We urge that individuals consider the risk involved

[Tr. 358]

in drinking alcoholic beverages.

Q. Do you urge that individuals not patronize institutions which serve alcoholic beverages, as a matter of course? A. We do not.

Q. Are you saying, then, that there is no opposing viewpoints to the viewpoint you express on Temperance Crusade? A. I said there has not been in seven years of broadcasting. And four years of that is on a daily basis.

Q. Once again, do you say there is no opposing viewpoint to what you state -- to what you put on in the Temperance Crusade? A. I don't know what exists. There has not been any called to my attention.

Q. You have no program, regularly scheduled on this station, for the presentation of an opposing viewpoint; is that correct? A. Not regularly scheduled.

Q. On which station is Temperance Crusade now carried in the St. Louis area? A. At this moment, it is not on a St. Louis station.

Q. Is it still carried on WGGH, Marion, Illinois? A. Weekly.

Q. Do you go to Marion, Illinois, and actively solicit the expression of opposing viewpoints to the Temperance Crusade?

MR. JOYCE: Objection. That is irrelevant.

PRESIDING EXAMINER: Sustained.

[Tr. 360]

* * * * *

BY MR. BADER:

Q. In connection with the Temperance Crusade proposed on this station, did you present to any individual whom you contacted a program format for the Temperance Crusade Program? A. I did not present a program format, but many of the people, perhaps half of the people that I contacted, have heard the temperance crusade and were aware of the fact, had been told from the pulpit, that this was to be a part of our proposed programming.

Q. Did you say "from the pulpit"? A. That is correct. Temperance is well within the scope of the church.

Q. Which pulpit? You mean the Christian Fundamental Church?
A. That is right.

Q. Is the Temperance Crusade presented on a commercial basis on any station at the present time? A. Not at the present time.

Q. Has it ever been?

[Tr. 361]

A. Yes.

You mean by "commercial" time -- you mean bought and paid for?

Q. Sponsored. A. Yes.

Q. Is it your plan to present on the Temperance Crusade Program any person other than yourself speaking, as a matter of course? A. I might get sick.

Q. Other than that, you would run it? A. Right.

* * * * *

REDIRECT EXAMINATION OF JOSEPH AUTENRIETH

BY MR. JOYCE:

Q. Reverend Autenrieth, in cross examination, you referred to the proposed assistant to you, the assistant general manager, as an executive officer. Would you please define what you mean by executive officer?

A. By executive officer, I meant someone who would be capable of carrying out my direct orders to him or any instruction that Reverend Hebblethwaite or Reverend Maxey might give him.

Q. Would he have a higher position at the station than Reverend Maxey or Hebblethwaite? A. Authority-wise, no.

Q. On cross examination, in response to a question concerning the type or the number of people that attended the services of Christian Fundamental Church, you made an answer of approximately one thousand. Did you mean that each Sunday that that is how many people come to the church? A. No. I did not mean that. I said that if we wanted to take a toll of the souls that attended the service, it would be in excess of one thousand. If you want to know how many would be in the church, the answer to that would be 150 to 200; and Sunday night, about a hundred.

Q. Would everybody that came to the church on Sunday

be a member of the Christian Fundamental Church? A. No. I wish it were true.

Q. Would you estimate, of that 150 or 200, how many would be members and how many would not be members? A. Slightly over half. Sixty percent may be would be members.

Q. Does Christian Fundamental Church have a policy of racial segregation? A. Never has had.

Q. Never has had. Does it have now? A. No.

Q. Have members of the Negro race worshiped at the edifice of the Christian Fundamental Church? A. They do quite regularly.

Q. On your radio station in St. Louis, if granted, would you ever exclude a record or a talk or a discussion or any other broadcast over your station based solely on the fact that the artist or the participant were a member of the Negro race? A. Absolutely not.

* * * * *

[Tr. 380]

* * * * *

Q. Would you permit the broadcast of a Roman Catholic Church service? A. Yes, sir. I would.

Q. Over your St. Louis station? A. Yes.

Q. On cross examination, a question arose as to the possibility of your being prohibited from engaging in politics. Now, on the FM Station, do you propose -- either you as an individual or Christian Fundamental Church as an organization -- to support a candidate for office? A. No.

Q. And if you were on a program such as the Lyceum as a moderator, would you actively advance the position of one of the advocates, assuming the two political candidates were on the opposite side?
A. I would not.

Q. Reverend Autenrieth, you testified it was approximately three months ago that you received a commitment for an assistant manager. Was that the first time that you gave any consideration about having someone with more broadcast experience than you associated with the station?

[Tr. 381]

A. No. I have considered that from the very beginning.

* * * * *

PROCEEDINGS RESPECTING THE SITE ISSUE

PRESIDING EXAMINER: The hearing will be in order.

Take the appearances for the record, please.

MR. BADER: For Milam and Lansman, Michael H. Bader and Andrew G. Haley, of Haley, Bader and Potts.

MR. DALY: For the Christian Fundamental Church, Harry G. Daly.

MR. ELYN: Irwin S. Elyn, E-l-y-n, for the Broadcast Bureau.

PRESIDING EXAMINER: Gentlemen, this morning, I believe the one thing that we have to resolve now, in view of the Review Board's Memorandum Opinion and Order of February 8, 1965, disposing of the one interlocutory matter that was pending, which had been filed by the Church, is the added issue that is the basis of my Order of January 19, 1965, which issue is: "To determine whether there is reasonable assurance that the intended site proposed by Lorenzo W. Milam and Jeremy D. Lansman, a partnership, is available for its proposed use."

Do all counsel concur with my statement?

MR. BADER: Yes, Mr. Examiner, that's what the Order reads; yes, sir.

MR. ELYN: Your Order so reads.

PRESIDING EXAMINER: Very well, there is just that one issue, then, that remains in this proceeding. Everyone is in

agreement with that.

MR. BADER: Yes, sir.

PRESIDING EXAMINER: Very well, Mr. Bader, I think that perhaps under the framing of the Order, the burden of proof is upon you to proceed this morning.

MR. BADER: Yes, Mr. Examiner, I would like to call as witness for Milam and Lansman Thelma Tucker. Miss Tucker is in the hearing room, and Miss Tucker, would you please take the stand to the left of the Examiner?

Whereupon,

THELMA TUCKER

was called as a witness and, after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BADER:

Q. Miss Tucker, will you please state your full name and address?

A. Thelma Tucker, 10000 Springwood, La Due, Missouri.

Q. And are you employed, Miss Tucker? A. Yes.

Q. Would you state your employment capacity? A. Real estate and rental agent, Harold Koplar and Associates.

Q. Is Harold Koplar and Associates the owner of the Continental Building in St. Louis?

[Tr. 556]

A. Yes.

Q. Where is your office, Miss Tucker? A. Continental Building.

MR. BADER: Mr. Examiner, I would like to have marked for identification M&L Exhibit 16. I am handing to the reporter two copies, and to the Examiner and counsel one copy, and to the witness a copy.

May that be so marked, please?

PRESIDING EXAMINER: Yes, it may.

(Exhibit 16 (M&L) was marked for identification.)

BY MR. BADER:

Q. Miss Tucker, directing your attention to M&L Exhibit No. 16, would you please identify what this document is? A. This is a lease option I had drawn up yesterday, for the tower of the Continental Building, and an extension of the tower for the Continental Building.

Q. And who are the lessees, under this instrument? A. The lessees would be Milam and Lansman.

Q. And is the photocopy of your signature on page 2 genuine?

A. Yes.

MR. BADER: Mr. Examiner, I offer M&L Exhibit 16.

PRESIDING EXAMINER: There has been an offer of M&L Exhibit 16. Is there objection thereto?

[Tr. 557]

MR. DALY: Mr. Examiner, I have not had a chance to read it. It was just handed to me. May I take a few minutes?

PRESIDING EXAMINER: Yes, indeed.

MR. ELYN: I have some voir dire questions I would like to ask the witness.

PRESIDING EXAMINER: Very well, you may.

VOIR DIRE EXAMINATION

BY MR. ELYN:

Q. In connection with this lease, Miss Tucker, were sketches submitted by Milam and Lansman? A. Sketches were submitted, as of yesterday.

Q. Do you have those sketches with you? A. Yes, I have a copy.

Q. May I see them? A. Yes, sir.

MR. BADER: Mr. Examiner, at this point, I would like to determine the relevancy of this line of questioning. The issue is solely the availability of the site, and if this line of questioning is directed toward suitability or feasibility, the Review Board has ruled twice in Memorandum Opinion and Order that those are not in issue, and inquiry may not be directed to them.

MR. ELYN: The purpose of my question, Mr. Examiner, is to compare the sketches with the sketches contained in the application filed by Milam and Lansman.

[Tr. 558]

PRESIDING EXAMINER: Well, I want to be sure to point out to you, now, that the application is not a part of this record.

MR. DALY: I think there could be a substantial variance.

PRESIDING EXAMINER: I am not saying that. I am saying that the application is not a part of this record, as of now. I am not cutting you off on your voir dire.

MR. ELYN: I understand, sir.

PRESIDING EXAMINER: What I am saying is I don't want there to be a discussion about something that isn't in this record, because the record obviously will be fatal.

MR. ELYN: Sir, what I would like to do now is examine those sketches, and perhaps go into this matter further on cross-examination.

PRESIDING EXAMINER: Well, do you want a brief recess for all parties?

MR. BADER: Well, Mr. Examiner, I would like a ruling on my objection, because it seems to me that the only end of counsel's questioning is suitability or feasibility, and I raised this at the pre-hearing conference, and the Review Board has ruled twice on it, and if counsel will assure us that this is not the purpose of his line of questioning, then we can proceed, but as far as I can see, the only logical result of this type of question is to go into these forbidden areas.

MR. ELYN: Mr. Examiner, if I may say so, suddenly at the

[Tr. 559]

time of this hearing, we were faced with a lease option agreement which I knew nothing about. Obviously, it was based on some sketches which I know nothing about, and I would like to have the opportunity to compare those sketches with any prior information on file with the Commission, and to perhaps explore this situation further in cross-examination, which I think I have the right to do, regardless of the statement made by Mr. Bader.

PRESIDING EXAMINER: Well, what I am going to do is that I am going to permit you to examine this exhibit, and I am not, of course, going to permit any cross-examination on suitability or feasibility, because I don't think that is the issue. I think the issue that the Review Board specified is the reasonable assurance issue, but on the other hand, I am going to give you the time, in order that you may determine that there isn't an attempt to mend the application by indirection here.

MR. ELYN: Yes, sir.

PRESIDING EXAMINER: I will do that. All right, we will take a brief recess. Let's make it 15 minutes, or until 10:30.

(Whereupon, at 10:10 a.m., a recess was taken until 10:30 a.m.)

PRESIDING EXAMINER: All right, very well, the hearing will be in order.

All right, Mr. Elyn.

BY MR. ELYN:

Q. Miss Tucker, one additional question. Are you familiar, in this lease option agreement that has been gone into just very briefly by Mr. Bader, mention is made that the lease will provide that use conform to all necessary governmental laws and regulations.

Are you familiar with the zoning regulations? A. No. Other than the fact that when necessary, I have to go get building permits for one thing and another.

MR. ELYN: Mr. Bader, are you prepared to go into this problem?

MR. BADER: I don't know of any problem, Mr. Examiner.

MR. ELYN: It goes to the reasonable availability.

MR. BADER: Mr. Examiner, I do not intend to go into feasibility or suitability. The issue was raised on a petition by the Church, and a petition by the Bureau, saying that we had no arrangement with the Continental Building. We have an arrangement with the Continental Building. The Review Board has twice ruled you can't take testimony beyond that.

For that reason, Mr. Examiner, I don't think it is necessary to go into all the ramifications of whether we or the Church or the existing station or anybody else out there has or needs a building permit, and I think that we should restrict this to the question, is there an agreement with the

[Tr. 561]

Continental Building, and the answer is obviously "yes."

MR. DALY: Mr. Examiner, might I be heard?

PRESIDING EXAMINER: Let me conclude with Mr. Elyn, and than I will go back to you, Mr. Daly.

Let me ask you, Mr. Bader, with this offer of M&L Exhibit No. 16, you rest your case as far as the burden of proof is concerned on the added issue. Is that correct?

MR. BADER: Yes, sir.

PRESIDING EXAMINER: Anything further?

MR. ELYN: I have one further question.

PRESIDING EXAMINER: Yes, certainly.

BY MR. ELYN:

Q. And this same paragraph, Miss Tucker, refers to "and shall not abridge prior rights of other lessees". Is there another lessee?

A. That depends on what you mean by "another lessee." On the same identical spot, it would be physically impossible, as an engineering feat.

Q. Does KADI-FM have its antenna on top of your building?

A. The building has been examined, and there is room for several antennas on top of that building.

Q. Yes, but you didn't answer my question. Does KADI-FM have its antenna on the top of your building? A. Not on the same site, exactly, physically, that

[Tr. 562]

these two, that Milam and Lansman and Christian Fundamental are asking for, no.

Q. But do they have an antenna on top of your building? A. The building has a large tower, and it has a good-sized top, and they are now existing, but they are off of the air, also.

Q. Do you have a lease with KADI? A. They broke their lease for non-payment of rent.

Q. Is that your position, or has that been a matter of court judgment?

MR. BADER: Mr. Examiner, I believe this is totally irrelevant, and I object.

PRESIDING EXAMINER: I think the objection is good. Sustained.

MR. ELYN: I would like to be heard on that before you sustain the objection, Mr. Examiner. I think that this goes directly to one of the paragraphs in this lease option agreement, "Shall not abridge prior rights of other lessees," and I think the rule of law here that the Commission has announced, as far as availability of site is concerned, is the question as to whether or not an applicant has proposed a site with reasonable assurance and good faith that it will be available to him for the extended purpose, and what I am trying to find out from Miss Tucker is whether or not KADI-FM has a lease with the Continental Building which might cover this very

[Tr. 563]

situation.

THE WITNESS: That would be --

PRESIDING EXAMINER: Just a minute, Miss Tucker.

MR. BADER: I believe that has been asked and answered, Mr. Examiner.

MR. DALY: May I have one word about this?

PRESIDING EXAMINER: No, this is between Mr. Bader and Mr. Elyn, now. I will let you have your inning in a minute.

MR. DALY: I wanted to take sides in this present discussion.

PRESIDING EXAMINER: Now --

MR. ELYN: I would like to know if there is a lease. Miss Tucker may feel that the lease has been broken, but I would like to know whether there is an instrument called a lease.

THE WITNESS: There is an instrument called a lease, but any time the lease is broken for non-payment, it is no longer legal.

MR. ELYN: Do you have a copy of that lease?

THE WITNESS: No, I do not.

MR. BADER: Mr. Examiner, I object.

PRESIDING EXAMINER: She doesn't have it.

MR. ELYN: I would like to explore that situation further, Mr. Examiner. I would like to know what that lease provides as far as any other licensee having an antenna on the

[Tr. 564]

tower.

MR. BADER: Mr. Examiner--

THE WITNESS: It does not--

MR. BADER: Excuse me. Counsel must then go to the Review Board with a petition to enlarge issues as to Christian Fundamental Church, as well as Milam, both of whom propose the same site.

Now counsel has not done this before. Counsel was fully aware of the existence of two proposals for the place. This is belaboring the record, Mr. Examiner.

PRESIDING EXAMINER: Yes, I agree. I don't think the line of questioning is appropriate, and I will sustain the objection.

MR. ELYN: All right, no further questions at this time. We will have some on cross-examination.

PRESIDING EXAMINER: All right, sir, certainly.

All right, Mr. Daly. Is this cross-examination?

MR. DALY: No, I wanted to ask a couple of qualifying questions about this first.

PRESIDING EXAMINER: All right.

MR. DALY: The exhibit has not yet been admitted in evidence.

PRESIDING EXAMINER: That's right.

MR. DALY: Miss Tucker, Harold Koplar and Associates, is that a partnership or a corporation, or what kind of an entity

[Tr. 565]

or firm is that?

THE WITNESS: It is a corporation.

MR. DALY: Are you an officer of it?

THE WITNESS: I am the rental agent.

MR. DALY: I mean, are you a president or a vice president?

THE WITNESS: No, I am not.

MR. DALY: We have objection to the instrument. Mr. Examiner, our first objection is formal. The instrument purports to rent space on a tower, whereas the lessors, the building owners, own certain radio tower facilities located on the roof of their building known as the Continental Building. Now that is the tower on which there are other antennae. Down below, in the "now therefore" clause, in consideration of the sum of \$300 lessors grant to lessees an option to lease the afore-said tower facilities for the installation and operation of radio, tower, transmission and antennae equipment on the roof.

Now in order for Milam and Lansman to successfully meet this issue, they must show that they have a reasonable expectation to build a tower 116 feet on top of the roof. What Koplar and Associates have offered Milam and Lansman is the same thing that the other people on the roof have. They can handle their antennae on the tower that is already there. There is no authorization here or no option here to allow any

[Tr. 566]

building on the part of Milam and Lansman, nor is there any statement with respect to that, nor is there any indication this paper that I have as to what Milam and Lansman would expect to build.

There are no sketches, there is no statement of an engineer, and so on.

PRESIDING EXAMINER: What you are doing, you are objecting to the receipt of M&L Exhibit No. 16?

MR. DALY: On two grounds. One, that it is not properly signed by an officer of the corporation; and second, is that it is immaterial whether this paper is signed by anybody or not, because it does not meet the issue. It does not show anywhere or any how that the building will permit the building of another tower on top of the roof.

PRESIDING EXAMINER: Very well. The objection will be overruled. Are you opposing the admission of Exhibit No. 16, Mr. Elyn?

MR. ELYN: I have one qualifying question to ask in that regard.

PRESIDING EXAMINER: All right.

MR. ELYN: Miss Tucker, are you authorized to sign a lease or an option in behalf of Harold Koplar and Associates?

THE WITNESS: According to the real estate laws of Missouri, yes. I represent them, and they are responsible for any of my signatures.

[Tr. 567]

MR. ELYN: Has Harold Koplar and Associates specifically authorized you to sign?

THE WITNESS: No.

MR. DALY: Excuse me a moment. I want to move to have that last stricken, Mr. Examiner.

PRESIDING EXAMINER: The objection is overruled. Mr. Elyn asked the question, and Mr. Elyn is apparently satisfied with the answer. Objection overruled.

MR. ELYN: Just one further question in that regard, Miss Tucker. Has Harold Koplar and Associates, a corporation, specifically authorized you to sign a lease option agreements in their behalf?

MR. DALY: I object. No foundation has been laid for that.

PRESIDING EXAMINER: Overruled. You may answer.

THE WITNESS: When you say "specific", do you mean a written agreement? Or an oral agreement, or --

MR. ELYN: Do you have any arrangement with them to sign in their behalf?

THE WITNESS: I represent them. And I can't say that I have any written agreement to sign in their behalf.

MR. ELYN: Do you do this ordinarily in the ordinary course of business during the day?

THE WITNESS: Yes.

MR. DALY: I object.

PRESIDING EXAMINER: Overruled.

THE WITNESS: Only on leases. I do not sign.

MR. ELYN: You do not sign on leases. But you sign lease option agreements?

THE WITNESS: Previously, I have.

MR. ELYN: I didn't understand that.

THE WITNESS: I have. Previously to this, I have signed option agreements.

MR. ELYN: But you do not sign lease agreements?

THE WITNESS: I do not sign lease agreements.

MR. ELYN: Can you explain that?

MR. BADER: Mr. Examiner, that is immaterial. We are not offering a lease here. The witness has testified --

PRESIDING EXAMINER: Well, as long as she's here, I am going to hear her. I don't know the relevancy and materiality. I am not passing on this, but she's here, she has come all the way from St. Louis to testify, and I will hear her. We want to at least try to resolve this. Then we can thrash it out in proposed findings, then I can write additional decision, and you can take an appeal.

MR. BADER: The editorial you?

PRESIDING EXAMINER: Off the record.

(Discussion off the record.)

PRESIDING EXAMINER: Back on the record.

MR. ELYN: I would like to, just for the record, state why

[Tr. 569]

I think this question is relevant, Mr. Examiner.

PRESIDING EXAMINER: All right.

MR. ELYN: I think that this lease option agreement obviously is looking toward a lease, and my question would be why the dichotomy between the right to sign a lease option agreement and not a lease.

MR. BADER: Mr. Examiner, that seems immaterial to me.

PRESIDING EXAMINER: Well, she is here.

THE WITNESS: Perhaps that's a rather informal answer coming, but I have worked for Mr. Koplar for about 15 or 18 years, and he just let's me do what I want to do. I don't know what to say to that.

PRESIDING EXAMINER: Well, if you don't know, you don't have to answer. But you did sign this lease option.

THE WITNESS: I sign when I think it isn't that important, and when I think it is going to be put on some particular legal record, like, for instance, I don't sign his checks. I just never took it upon myself.

PRESIDING EXAMINER: You worked for Mr. Koplar, and you have his latitude of discretion of what you do, don't you?

THE WITNESS: Yes, I think he leaves this a great deal up to my own discretion.

MR. ELYN: I see. Is this lease option agreement, the original, filed with anybody in St. Louis? Is it filed at a

[Tr. 570]

court house or any place like that?

THE WITNESS: We don't file our options in the court house. It isn't necessary.

MR. ELYN: No further qualifying questions on that point. I have no objection to the lease option agreement, with the reservation that Miss Tucker may not have the authority to sign in behalf of Harold Koplar and Associates, but other than that, I have no objection.

PRESIDING EXAMINER: Very well. Any and all objections to and in line with Exhibit No. 16 will be overruled, and the exhibit will be received in evidence.

(Exhibit 16 (M&L) was received in evidence.)

PRESIDING EXAMINER: All right, now cross-examination, Mr. Daly.

Let me say one thing before we proceed. Have you ever testified before in a hearing of this nature?

Well, if you don't know the answer to any questions, you don't have to answer them, you don't have to guess. If you don't know, just say you don't know. You are sworn to tell the truth, and give truthful answers to your questions, and that's all you have to do.

I say that to you because sometimes I have witnesses that appear, or we have witnesses that appear before us in hearings that have never testified in court or in an

[Tr. 571]

administrative proceedings, and all we are trying to do here is get the facts of this case, and tell the truth, and the chips will fall where they may.

CROSS EXAMINATION

BY MR. DALY:

Q. Miss Tucker, I think you stated in connection with the effort to find out whether or not arrangements could be made to build a tower on Continental roof, that you had received some drawings of an engineer that depicted the type of tower that would be built. Is that right?

A. That's right.

Q. Now, was that to be a guyed tower, that is, with guy wires holding the tower in place?

MR. BADER: Objection, Mr. Examiner. This goes beyond the availability issue.

PRESIDING EXAMINER: I think that's right. Sustained.

MR. DALY: Mr. Examiner, we are prepared to show that it is not a question of availability, it is a question of inconsistency, now, with the application. Let me explain to you how this may work out.

MR. BADER: Mr. Examiner.

MR. DALY: Just a minute.

MR. BADER: I find this highly prejudicial to my case. I find this highly prejudicial to my case.

MR. DALY: Of course it is prejudicial to your case.

[Tr. 572]

PRESIDING EXAMINER: We won't argue. Argue it in the exceptions. We will argue that in proposed findings. But I am not now-- I made it clear the other day, and I make it clear this morning, we are not going into the suitability, and this witness is not an engineering expert. She is here to testify as to his on behalf of her firm, Koplars and Associates. And we have got here an exhibit now that she is going to testify to, but as to engineering facets, a question as to adaptability and suitability, this witness isn't qualified. She hasn't been brought here for that purpose, and I am not going to permit questions along that line.

MR. DALY: Mr. Examiner, the witness has said that she has a right to sign this agreement. We have a right to know what went behind the signing of the agreement. We can't just take a piece of paper like this and say, "Well, this gives Milam and Lansman a right to build a tower on top of a roof" without knowing whether or not the tower will look anything at all like what Milam and Lansman proposed to the Federal Communications Commission.

PRESIDING EXAMINER: You ask the questions, and I will rule on them. I am not going to argue with you about it.

BY MR. DALY:

Q. When were sketches of the tower submitted to you?

MR. BADER: Objection, Mr. Examiner, irrelevant.

PRESIDING EXAMINER: Overruled. You may answer.

[Tr. 573]

THE WITNESS: February the 10th, 1965.

BY MR. DALY:

Q. 1965. That was yesterday. Had you asked for sketches earlier?

A. Yes.

Q. How early did you ask for sketches?

MR. BADER: Objection, Mr. Examiner, irrelevant.

PRESIDING EXAMINER: Overruled. She may answer.

THE WITNESS: I have no record.

BY MR. DALY:

Q. Specifically, did you ask in September of 1964? May I refresh your recollection?

MR. BADER: Mr. Examiner, I object. Counsel is attempting to testify.

BY MR. DALY:

Q. Do you recall having a discussion --

MR. BADER: May I have my objection?

BY MR. DALY:

Q. -- in St. Louis --

PRESIDING EXAMINER: Just a minute. Do you know the answer to the question?

MR. DALY: Well, when I start to talk, I usually try to finish, even if counsel objects, because I think I have a right to finish my sentence and my question.

PRESIDING EXAMINER: So the record is clear, the

[Tr. 574]

question has been asked of the witness, and there was some discussion between counsel, and Mr. Bader has lodged an objection, and I asked the witness, does she have an answer to the question.

Now the question is one Mr. Daly asked you specifically as to September, 1964. And if the witness does have an answer, she may give the answer. If she doesn't know, she may say so.

MR. BADER: May I lodge a further objection, Mr. Examiner?

PRESIDING EXAMINER: You may.

MR. BADER: The Review Board, this week, has denied a request for enlargement of issues on the matter to which Mr. Daly is now addressing his questions, and that is, whether there was any character qualification as to whether there was a contact with the rental agent prior to this time, and so on.

On those issues, the Review Board ruled explicitly, on February 8th of this year, that the requested issue must be denied, and is denied.

Now, Mr. Examiner, the counsel is attempting to explore all of the serious allegations which he made and which were rejected by the Review Board, and this prejudices my case.

MR. DALY: Mr. Examiner, I did not.

PRESIDING EXAMINER: Well, regardless of whether you did or whether you did not, do you have an answer to Mr. Daly's

[Tr. 575]

question? Do you remember, do you recall?

THE WITNESS: I do not recall.

PRESIDING EXAMINER: Very well, then.

BY MR. DALY:

Q. Do you recall at any time asking for either information with respect to the type of tower or an engineering statement or sketches?

A. Yes.

Q. Can you place the time that you first asked? A. It was about the first of October.

PRESIDING EXAMINER: 1964?

BY MR. DALY:

Q. And to whom did you make the request? A. Mr. Lansman.

Q. Was that your first contact with Mr. Lansman? A. Yes.

Q. Now what did you do with these sketches when you received them yesterday?

MR. BADER: Mr. Examiner, I maintain my objection to this line of questioning as to material irrelevancy and beyond the scope of the direct examination. Direct examination is limited to one fact: This is a lease option agreement. It does not go to these other points. Counsel is obviously attempting to make my witness his witness. He has given notice of two witnesses that he was going to produce

[Tr. 576]

himself. He has not produced one of them, and I object to his using my witness for the purpose of attempting to introduce rebuttal case on issues which are not relevant.

MR. DALY: Mr. Examiner, if I so desired to use counsel's quote, "his witness," I must remind him he doesn't have a witness. He owns no witness. Any witness that appears here belongs to anybody who wishes to examine, and if I wish to make Miss Tucker my witness, I can, but I haven't, for I have resolved to stay within the bounds of the direct case. We are now talking about the background for this document called lease option agreement.

PRESIDING EXAMINER: Well, I asked Mr. Bader specifically a minute ago, you will recall, as to whether he was meeting the issue with this document and this witness. This witness has sponsored the document, Exhibit No. 16.

Now Mr. Bader has to either fall or rise on that exhibit. Now any exploration as to prior negotiations or discussions or the past, I can't see that it is relevant or material. This is a document. She testified that she signed it yesterday. She says she has the authority to execute the option agreement, and I think that's what we are limited to.

MR. DALY: Well, I think I am entitled to know what the proposal is behind the document. This document describes nothing, Mr. Examiner.

PRESIDING EXAMINER: Well, now, that's argumentative.

[Tr. 577]

I don't want to hear argument on whether this is a good or a bad exhibit. I am not here to hear that.

This witness has come in here and she sponsors this exhibit. She says that is it. Mr. Bader says he is going to stand on it.

Now if she had some discussions in September, or October, 1964, or 1962, I don't see the relevancy, as it relates to this particular exhibit, and the testimony of this witness.

MR. DALY: Well, Mr. Examiner, my question was directed to yesterday. Yesterday, what did she do with the plans for the tower? Yesterday, when they were received?

MR. BADER: Mr. Examiner, the plans for the tower are not in evidence. The other matters are not in evidence. This is certainly going to suitability, feasibility, and it seems --

PRESIDING EXAMINER: Yes, I am going to sustain the objection.

MR. DALY: Mr. Examiner, let me ask a series of questions, and you can then rule on them as you see fit.

PRESIDING EXAMINER: Very well.

MR. DALY: We will try to keep within the bounds of that.

BY MR. DALY:

Q. Will your engineer have to approve any tower proposal that is put on the top of the roof?

MR. BADER: Objection, Mr. Examiner, immaterial.

[Tr. 578]

PRESIDING EXAMINER: Sustained. It hasn't even been proven that she has an engineer.

BY MR. DALY:

Q. Will you have to have any additional authority to put the tower on the roof?

MR. BADER: Objection, Mr. Examiner. The premise for the question is incorrect.

PRESIDING EXAMINER: Overruled. Overruled.

MR. BADER: The witness is not putting the tower on the roof, Mr. Examiner.

PRESIDING EXAMINER: Well, he means your applicant, your client.

MR. BADER: Well, Mr. Examiner, these are extremely technical questions, and I want my position made clear, that I object very strenuously to counsel exploring all these matters which are beyond the record.

PRESIDING EXAMINER: That is overruled. She may answer the question. Do you understand the question?

THE WITNESS: Yes. I would have to have further authority.

BY MR. DALY:

Q. What additional authority would be necessary? A. The authority of owners of the building. Mr. Morris Shenker, and Mr. Koplar, and Mr. A. J. Cervantes.

[Tr. 579]

PRESIDING EXAMINER: Will you spell those principal names for the reporter, please?

MR. DALY: K-o-p-l-a-r. C-e-r-v-a-n-t-e-s. S-h-e-n-k-e-r.
Is that right?

BY MR. DALY:

Q. Would it be necessary to have a building permit from the City of St. Louis?

MR. BADER: Objection, Mr. Examiner.

THE WITNESS: I can't answer.

PRESIDING EXAMINER: Sustained. She says she can't answer, anyway.

BY MR. DALY:

Q. Is the Continental Building within the confines of the City of St. Louis?

MR. BADER: Objection, Mr. Examiner. Irrelevant.

PRESIDING EXAMINER: Sustained.

BY MR. DALY:

Q. Who owns the Continental Building?

MR. BADER: Objection, Mr. Examiner, asked and answered.
This is repetitious and cumulative.

PRESIDING EXAMINER: It has been asked and answered. Sustained.

MR. DALY: I didn't hear you.

PRESIDING EXAMINER: I say it has been asked and answered.
Sustained.

[Tr. 580]

BY MR. DALY:

Q. Let me ask you: Do you understand it is owned by the corporation or by the individuals of the --

MR. BADER: Mr. Examiner, this is on the record. If counsel hasn't paid any attention, we can't fix his case up.

MR. DALY: Excuse me. Mr. Examiner, I don't recall exactly how the building was owned, whether it was owned by Koplar and Associates, or by individuals.

PRESIDING EXAMINER: All right, she has answered. You testified it was a corporation, is that right?

THE WITNESS: I have never looked up their legal standing on this question.

MR. DALY: I didn't hear you.

THE WITNESS: I have never looked up their legal standings on this question in the court.

BY MR. DALY:

Q. And you don't know how the building is owned.

MR. BADER: Objection, Mr. Examiner.

THE WITNESS: We pay taxes under Harold Koplar and Associates.

PRESIDING EXAMINER: Overruled, she has answered.

BY MR. DALY:

Q. Now, did one of the air lines propose to build a structure on top of the Continental roof to put a light on in the last year or two?

[Tr. 581-582]

MR. BADER: Objection, Mr. Examiner, irrelevant.

PRESIDING EXAMINER: Sustained.

MR. DALY: Mr. Examiner, I want to show the impossibility of getting a permit to extend the --

MR. BADER: You have just admitted what I have been saying for an hour.

PRESIDING EXAMINER: That goes to suitability; yes, sir. Sustained.

MR. DALY: That's not suitability. That's possibility.

PRESIDING EXAMINER: Sustained. She is in here sponsoring this agreement. The representative of Harold Koplar and Associates. She has allegedly signed an agreement here with one of the applicants for certain things that are to be done or spelled out in the agreement. Now if there is a disagreement over the terms of this agreement, that is subject to a litigation in the court of competent jurisdiction, but that's not the prerogative of this Hearing Examiner to test what this agreement does or does not involve.

MR. DALY: Well, I think that we do have to somewhere find something to determine whether or not there is availability of this site. And I can't see how there can be availability of the site, Mr. Examiner, under the rule laid down by the Commission in Springfield Telecasting, 3 R.R. 2nd, 727, unless we do go into the possibility of the actual, the actual possibility, of being able to do what Milam and Lansman say

[Tr. 583]

they want to do.

PRESIDING EXAMINER: I don't agree with you at all.

MR. DALY: Then I understand you have overruled the last question?

PRESIDING EXAMINER: I have.

MR. DALY: Now I want to ask a series of questions having to do with the sketches and ask to be shown the sketches. Now may I go into that?

MR. BADER: Mr. Examiner, I will object to that.

PRESIDING EXAMINER: We are not going to interrogate this witness about something that is not in this record. That goes to the application and the sketches. Neither are a part of this record, and we are not going to engage in speculation as to what or what might not be on something that is not in this record.

MR. DALY: Well, I offer in evidence the engineering statement of Nugent Sharp, which is part of the application prepared by Milam and Lansman and filed with the Federal Communications Commission and presently on file with the Commission, signed by Mr. Sharp, dated October 23, 1963, and headed "Nugent S. Sharp, Consulting Radio Engineer, Affidavit."

MR. BADER: I object, Mr. Examiner. Counsel has no witness. Counsel has nothing to direct, no issue to direct this offer to, so therefore it is incompetent, because there is no witness; and secondly, it is immaterial, because there

[Tr. 584]

is no issue.

MR. DALY: I wasn't quite through, Mr. Examiner. I offer this in evidence by asking you to take official notice of that particular page in the application. It states that "Figure 2 of this statement is a vertical plane of the proposed installation," and that "it is proposed to install a guyed tower of 116 feet at the present location of the 56-foot tower used by KADI-FM, and to mount the gates FMA-60 on the upper portion of the tower as shown, permitting the Collins 37N5 antennae of the KADI-FM to remain in its present location."

MR. BADER: Mr. Examiner, I object to this engineering testimony.

MR. DALY: And I also direct your attention to Figure 2, which is the second page following that affidavit in the application, and ask that you take official notice of both of those documents.

MR. BADER: I object, Mr. Examiner. This is engineering testimony by counsel.

PRESIDING EXAMINER: Well, I am not going to take official notice of Commission documents, unless the excerpts are here and made a part of the record. We don't do that type of practice, or at least, I don't. I want to see what I am taking official notice of. I want copies in the hearing room, and we are not going to run to the files of the

[Tr. 585]

Commission to look up official copies of anything at any time, because they certainly will not be a part of the record on appeal.

MR. DALY: We will supply copies. If the application is in the room, I will show it to you now. Is the application here?

MR. BADER: Mr. Examiner, this procedure is extremely irregular. It is immaterial, and it is inconsequential, and I don't think our hearing record should be burdened or Miss Tucker's time taken up, or the rest of our time taken up, with this sort of attempt to put in an engineering case.

I recall once again that counsel has failed to produce the engineer, and of course the reason he did was there was no issue for the engineer to testify to.

PRESIDING EXAMINER: Mr. Elyn, what do you say about this?

MR. DALY: This is a description of the tower and the sketch showing the tower.

MR. ELYN: Just a moment, please.

It would seem to me that if the Examiner please, that before any consideration could be given to a request of this nature, that Mr. Sharp might have to make Mrs. Tucker his own witness.

MR. BADER: Mr. Examiner, Miss Tucker can't testify on this.

[Tr. 586]

PRESIDING EXAMINER: Well, I think you are getting way far afield in this hearing as it relates to the issue that was added by the Review Board, and I think it is going to be another endless maze of going nowhere fast.

This witness is in here, again, and I reiterate, sponsoring an exhibit. Mr. Bader has hung his hat on the exhibit and the testimony of this witness, and now, to go outside and bring in extraneous matter, I don't know where it is going to lead us, or what it would prove, Mr. Daly. I can't even fathom what you are driving at as far as this witness is concerned.

MR. DALY: I will tell you what I am driving at. If we don't know what Mrs. Tucker proposes to agree to, then there is no way that we

can tell whether or not Milam and Lansman proposed to build that which they said in their application.

PRESIDING EXAMINER: That may be very well, that may be very true, but this witness has signed an agreement. Now, if it ends up that there is controversy about what the contents of this lease option agreement are, it is not to be thrashed out here, and before there is any initial decision or in any way to resolve the rights of the various parties over a lease option agreement, or the terms of that agreement.

Now you can argue that on your proposed findings; it may or may not be good, I am not precluding that, but for me to sit here and listen to hours and hours of argument and debate

[Tr. 587]

about what the engineering facets of this case are, as it relates to this particular issue, I think it is a waste of time, and I certainly think it is irrelevant and immaterial.

MR. DALY: Well, now, will you listen to one statement, then, from me?

Under this agreement, as it is written, there is no question about the fact that if the Continental Building wished to rent to Milam and Lansman one of the legs of the present structure, they could do it, under this. But I don't see how they could do anything else, but let me tell you this: Our application represents an application with much more power than Milam and Lansman does, and the advantage that Milam and Lansman would get in having an additional tower is the important part of this case, because additional height means additional coverage.

Now if Milam and Lansman, after we are through with this hearing, and if they should be successful, and then would put their tower on the side of the present structure, and not extend it 116 feet up in the air above the building, then you will effectively have given a grant to the lesser of the two engineering proposals, if everything else were even, we would say, so you see where we are going.

PRESIDING EXAMINER: No, I frankly don't see where we are going on that.

MR. DALY: At this point, we don't know what its going

[Tr. 588]

to prove.

MR. BADER: We are going to that tower in Seattle. I suppose counsel thinks we are going to put it up there, instead of in St. Louis. This is ridiculous, Mr. Examiner.

PRESIDING EXAMINER: We are arguing matters that are not germane to the added issue that is now before the Hearing Examiner, and that's all I am going to hear, and I made it perfectly clear at the hearing conference, and I thought I made it clear here three times this morning.

Once again, we are going to be limited only to the added issue, not to any engineering facets or any fishing expeditions relating to any transactions between this applicant and the company that this witness represents.

MR. DALY: Now do I understand that I will be precluded from asking any questions, then, with respect to the actual description of that thing which is supposed to be built and for which this option lease is supposed to refer?

PRESIDING EXAMINER: This witness has not testified in any respect as to any engineering facets in this proceeding, or as to what the tower or what the antennae, or anything you want to talk about in that connection, as it pertains to this building.

This witness has come in here and says that she has signed this agreement. It is before the Hearing Examiner, and she says there has been a sketch submitted, a sketch not in the

[Tr. 589]

record. What was contained in that sketch, I do not know. And she has not appeared here as a professional engineer. She has not testified in

any respect as to the engineering or the construction of any tower on the Continental Building in St. Louis.

She says that there is a lease option agreement, and she has signed it, and I am confident from her testimony that she has the authority to sign the lease option agreement.

Now if there are going to be differences of opinion between the parties, then they can litigate that in some court somewhere, but not here.

MR. DALY: Well, our difference of opinion isn't that, Mr. Examiner. Our question is whether or not Milam and Lansman really intend to build that which they said in their application.

MR. BADER: Well, there is no issue on that, Mr. Examiner.

MR. DALY: That is always an issue.

PRESIDING EXAMINER: I recognize the fact that you are representing your client, and you are doing a good job, and in here battling for him, but we are going to be confined to the added issue, and the testimony of this witness, up to this point.

MR. DALY: Now do I understand that you have refused my request to put into evidence the engineering material that I

[Tr. 590]

showed you out of the Milam and Lansman application?

PRESIDING EXAMINER: I have refused to take official notice of your suggestions, without seeing it, as it relates to the added issue that was specified by the Review Board, yes, sir.

MR. DALY: Now without seeing it, can I show it to you? Would that make any difference to you?

PRESIDING EXAMINER: I know what you have reference to, but I mean, without having it tendered.

Let me explain it this way. To save time, I am not going to ask you to produce it, but I am not going to take official notice of what you

have read into the record as it relates to this additional issue, because I think there is no relevancy nor materiality in respect thereto.

MR. DALY: Very well.

BY MR. DALY:

Q. Now Mrs. Tucker, the question has arisen with respect to the number of other electronic antennae on the roof of the Continental Building. Would you tell me, please, who you have authorized to put antennas on the roof of that building, up to date?

MR. BADER: Objection, Mr. Examiner. Irrelevant and beyond the scope of the direct examination.

PRESIDING EXAMINER: Sustained.

MR. ELYN: May I be heard on that, sir?

[Tr. 591]

PRESIDING EXAMINER: Yes.

MR. ELYN: I think that the lease option agreement has been offered in evidence, and has been accepted by the Examiner, and there is a specific reference in that particular lease option agreement signed by Mrs. Tucker, paragraph 1, "Lease will provide that use conform to all necessary governmental laws and regulations, and shall not abridge prior rights of other lessees," and I think that that latter statement would give counsel the right to examine what prior lessees there might be on that building, because this instrument is now in evidence.

MR. BADER: Mr. Examiner, that does not follow. We must stay within the issue. The lease option agreement could say, for example, that the tower will be painted black, white, blue, and green, and that wouldn't put that aspect within the issue, Mr. Examiner.

You can't say that we are going to have this witness testify as to what Mr. Daly says is an issue on electronic devices. She is not testifying on that.

PRESIDING EXAMINER: No, I adhere to my original ruling. The objection is sustained.

MR. DALY: Mr. Examiner, we will offer, make an offer of proof. If the witness were allowed to answer, she would testify that KADI-FM tower is on the roof, that the Apollo -- would you give me the correct name of Apollo, please? Do you

[Tr. 592]

remember it, Miss Tucker?

MR. BADER: Well, Mr. Examiner, I object to this. This is not only counsel attempting to testify, he is asking the witness, now, on issues which have been denied him on questions which have been denied him, and this is immaterial.

PRESIDING EXAMINER: Well, I think the record heretofore, the four and a half days hearing that we had, shows that there are other constructions on top of this building, and I don't think there is any question.

There is no question in my mind but what there are other constructions on top of the tower of this building.

MR. BADER: That's correct, Mr. Examiner. The counsel's own witnesses said that.

PRESIDING EXAMINER: What I am ruling on is that we are not going to have this witness testify what these are, all about these towers, what they do or what they don't do. If they violate the terms of the agreement, then they can litigate it some place else, but not here, or not even go into any remote speculation as to what interference might or might not be on top of that building. They have signed an option agreement here now. Not it is up to them to live up to it.

MR. DALY: Mr. Examiner, I was interrupted by counsel, when I was trying to make an offer of proof, and sometimes when that happens, you forget to complete the offer, and I

[Tr. 593]

would like to continue.

If we were allowed, if Mrs. Tucker were allowed to testify, she would show that there are three authorizations by the building for FM antennas, and more than two for high frequency antennas.

MR. BADER: Mr. Examiner, my response to that is that --

MR. DALY: Mr. Examiner, there is no response counsel has to make to that.

MR. BADER: The offer of proof is legally defective, because an offer of proof can't be made on cross-examination.

PRESIDING EXAMINER: Well, regardless of that, it is a known fact, the record shows that there are other structures on top of that building, and I know it, and the only way I know it is from the record in this proceeding, so if that's what you want, Mr. Daly, why I very frankly will say that the record certainly shows that.

I don't know who they are, or how many, or the types, but we had several days, arguing back and forth about oh other operators in this building.

MR. DALY: And I would also like to make an offer of proof with respect to the engineering of Nugent Sharp appearing in the application of BPH-4218 for Milam and Lansman.

PRESIDING EXAMINER: That will be overruled.

MR. DALY: What is overruled, Mr. Examiner?

PRESIDING EXAMINER: Your offer of proof.

[Tr. 594]

MR. DALY: I don't think you can overrule my offer of proof, because I am not asking the Examiner to do anything. I am just simply stating what my offer of proof is. I have offered in evidence a matter in evidence which you have rejected. It has nothing to do with the witness.

PRESIDING EXAMINER: Well, you have made -- no. Now wait a minute. You have asked me to take official notice of certain documents of the Commission.

MR. DALY: Right.

PRESIDING EXAMINER: And I have refused to do that on the ground that my ruling is that there is no relevancy involved or materiality. Materiality or relevancy involved as it relates to the added issue.

MR. DALY: Right, but now how can you stop me from making an offer of proof?

PRESIDING EXAMINER: What are you going to prove?

MR. DALY: I am going to make an oral offer of proof, as I have a right to do under the Hearing Manual.

PRESIDING EXAMINER: Well, I don't know what offer, what offer of proof you have to make, other than a request to take official notice of something.

MR. DALY: Well, Mr. Examiner, if you do agree to take official notice of some document of the Commission, it then becomes testimony. At that point, we would be able to argue it in our findings and discuss it, and so on. Now if you do

[Tr. 595]

not, it doesn't get into the record. Therefore, we have the offer of proof.

PRESIDING EXAMINER: Yes --

MR. DALY: -- otherwise --

PRESIDING EXAMINER: Yes, Mr. Daly. Now you are coming right back to what I said in the beginning. You are trying to make an offer of proof on something that is not in this record, and when this case goes up on appeal, and there is nothing to refer to. There is nothing to refer to.

MR. DALY: Well, I have to have the offer of proof so I can refer to it. When we get up on appeal, heaven forbid, we have to have something to refer to.

Now let me explain to you why I think this is so important.

MR. BADER: Mr. Examiner, counsel is --

MR. DALY: Just a minute, please.

MR. BADER: It prejudices my case.

MR. DALY: Now I am very fond of counsel, and I know he is representing somebody, and I am sure if he weren't excited, he wouldn't interrupt like this.

MR. BADER: I object, Mr. Examiner. Counsel is prejudicing my case.

PRESIDING EXAMINER: No, Mr. Bader.

MR. DALY: The point, that which is offered in evidence, when it is overruled, there is a right on the party offering

[Tr. 596]

to submit either orally or otherwise a statement as to what he would prove. Now that is done so that the Examiner will be certain in his position as he can be, and in the event of appeal, it may be carefully weighed by those who have to consider it.

I do not think that you have a right to say to me, "You can't make an offer of proof."

PRESIDING EXAMINER: Mr. Daly, that's not what you are trying to do. You are trying to testify now as to what there is in the engineering of Milam and Lansman on an application that is on file with this Commission that is presently in hearing.

Now you have not come in here with copies of that, of the document that you want me to take official notice of, and when anyone reads this record, they won't have the faintest idea as to what you are talking about.

MR. DALY: Mr. Examiner, I do have the document in the room. I do have the paper that I want you to take official notice of in the room. I do not have copies. I will supply copies. I did not know that this would have to be brought out this way.

PRESIDING EXAMINER: What do you say about this, Mr. Elyn?

MR. ELYN: I think that this whole matter is controlled by the Review Board's Memorandum Opinion and Order, as has

[Tr. 597]

been pointed out by the Examiner, and that the issue to be added pursuant to that Review Board's Order is to determine whether there is reasonable assurance that the antenna site proposed by Lorenzo W. Milam and Jeremy D. Lansman, A partnership, is available for its proposed use.

What counsel is now trying to get at, I don't quite understand, in view of that ruling of the Review Board.

MR. DALY: Mr. Examiner, we are talking about what the evidence is. We are talking about my right to state to you what proof would be given if the question were answered, or if you took official notice. The only thing we have at the minute is my right to say to you, "This is what I am relying on, and this is the reason I am relying on it as argument," I don't have to say this is why I do it.

I am showing what it is, what would have been proved if you had permitted yourself to take official notice of the document.

PRESIDING EXAMINER: Well, I frankly can't see, Mr. Daly, that your argument has anything to do, as to the issue, added issue, and that relates to the availability of this antenna site on the top of the Continental Building in St. Louis. Whether the applicant, which is not in hearing, as I have said before, are going to build a mile high or two feet high, is not before me.

It is a question as to whether the site that they have

[Tr. 598]

alleged that they have, whether there is a reasonable assurance, that it is available. That's the only thing. Whether they are going to have it diamond-studded, or whether they are going to have it with tin is of no concern to the Hearing Examiner.

MR. DALY: Maybe you are right. You see --

PRESIDING EXAMINER: Indeed, I am right. You concede I am right, don't you?

MR. DALY: No, I don't concede you are right, because I don't know whether it is going to be tin or not, but you see, you have ruled on the admissibility, and I am not arguing with you about the admissibility of the evidence.

My statement to you is now that I am allowed to make an offer of proof, because you have ruled against me.

PRESIDING EXAMINER: Well, I am going to lean over backwards and hear you, just to see what the relationship is of this potential offer of proof, what it has to do with the added issue, and if it is good, I will let it in; and if it is not, then I will strike it. What would you prove, if I took official notice of what you have read into the record, as it relates to the added issue?

MR. DALY: You want me to argue on what it would do?

PRESIDING EXAMINER: I want to hear you. I am intrigued by it now.

MR. DALY: You want to hear what the testimony would be,

[Tr. 599]

or what effect the testimony would have?

PRESIDING EXAMINER: What I want to know is what relationship there is to your argument to the question as to whether the proposed site of Milam and Lansman in St. Louis, whether there is a reasonable assurance, predicated on the evidence that Mr. Bader has now put in the record, to which the witness has testified.

MR. DALY: All right. If we were allowed to show what Mr. Sharp has stated --

PRESIDING EXAMINER: Now who's Mr. Sharp?

MR. DALY: Mr. Sharp. The engineer for Milam and Lansman. In the application for Milam and Lansman, he shows that there would be

a guyed tower built to support an antenna for his FM station, or for the Milam and Lansman FM station.

If I were allowed to show that, and if I were allowed to get the answer from Miss Tucker with respect to the construction of this particular tower, I would then show that there is a variance, because Milam and Lansman have not shown Mrs. Tucker that which they have said they were going to build in their application.

And I therefore have asked you to permit me to make an offer of that proof, which I have made, I suppose, now.

MR. BADER: Mr. Examiner.

PRESIDING EXAMINER: Yes, Mr. Bader.

MR. BADER: This, once again, is suitability and it is

[Tr. 600]

not availability, and it just seems to me incredible that we are now in a full half-day on a simple point of law, getting into engineering, getting into things that Mr. Daly wants to testify to as an engineer, and cluttering this record with things that are specifically ruled out by the Review Board, twice.

PRESIDING EXAMINER: Well, he has made his statement. I don't see any relationship as to materiality and relevancy of the issue in this proceeding, but it is in the record, and he can argue pro and con on the proposed findings, and on his exceptions.

MR. DALY: Surely, Mr. Examiner, if I were on the other side, I would take the same position as counsel does.

PRESIDING EXAMINER: Very well. You know my position.

MR. DALY: Suitability, to me, means will the building allow this particular tower to be built on its building? That's all I am trying to get to. And Milam and Lansman has stated what kind of a tower they have. Now whether or not it will interfere with other people on the roof, or whether or not it will do the job is suitability.

PRESIDING EXAMINER: Yes, and right there is where you are destroying your own statement. The Review Board said in its Memorandum of Opinion on January 18, 1965, and I quote: "The Board's disposition of the Bureau's motion does not, however, comprehend a determination of the suitability of the

[Tr. 601]

proposed antenna site, and the Board notes the absence of any factual allegations concerning such a question." And I think that dispels any argument that you have on that point by the Review Board's statement itself.

Now if I misread it, I am certainly standing to be corrected.

MR. DALY: All right, let me see if I can correct you, then.

MR. BADER: Oh, Mr. Examiner.

MR. DALY: Just a minute. Don't interrupt me any more, please.

PRESIDING EXAMINER: I don't want to hear any more about suitability, and that's what you are arguing.

MR. DALY: Mr. Examiner --

PRESIDING EXAMINER: Mr. Daly, I don't want to hear any more about suitability in this proceeding.

MR. DALY: Mr. Examiner, I have not talked about suitability.

PRESIDING EXAMINER: Yes, you have, and I do not want it. It is my interpretation that it is suitability, and Mr. Daly, I am not going to hear any more of that line of argument.

MR. DALY: I can't see how.

PRESIDING EXAMINER: Let's proceed.

Let's proceed, Mr. Daly.

MR. DALY: I have never said that this was unsuitable.

[Tr. 602]

PRESIDING EXAMINER: Mr. Daly, I asked you to proceed.

MR. DALY: I am proceeding.

PRESIDING EXAMINER: We will take a brief recess at this point.

(Whereupon, at 11:30 a.m., a recess was taken until 11:40 a.m.)

PRESIDING EXAMINER: All right, Mr. Daly, we will proceed.

MR. DALY: Mr. Examiner, now I don't think that you and I probably understood or were interpreting the wording of the Board the same way, and I have advanced my position to a point where I think that it may have been aggravating, and I want to apologize to you. I only have two or three more questions to ask.

PRESIDING EXAMINER: Well, that's perfectly all right. No, it wasn't, your argument wasn't objectionable to the slightest degree. I just don't want to get off on suitability.

MR. DALY: Well, that was the question, whether your interpretation, or mine.

BY MR. DALY:

Q. Now, Mrs. Tucker, in the [preparation] of the agreement which is labeled Lease Option Agreement, and prior to the preparation of this -- you didn't prepare this, excuse me, the lease option agreement, did you? A. No, I had my attorney prepare it.

[Tr. 603]

Q. You personally didn't prepare it? A. No, I personally didn't.

Q. Now before this was prepared, were you shown a sketch that was prepared by an engineer, which engineer had a certification showing that he was an engineer, that he had a certification from the State of Missouri or the City of St. Louis, and had his seal on it?

MR. BADER: Objection, Mr. Examiner. This has been asked and answered in part, but the other four parts of this question are multiple, and I think it is objectionable.

PRESIDING EXAMINER: Well, it is kind of a double-barreled question, but I am going to overrule the objection. You can answer it, if you understand the question.

THE WITNESS: What was the question again?

BY MR. DALY:

Q. Well, the question was whether or not you were submitted anything showing the tower that had on it the seal of an engineer who was licensed in either the City of St. Louis or the State of Missouri? A. It has no seal.

Q. There is no seal. Will it be necessary to remove the water tower to build the proposal that you based your lease option agreement upon?

MR. BADER: Objection, Mr. Examiner.

THE WITNESS: I can't answer.

[Tr. 604]

PRESIDING EXAMINER: Sustained.

BY MR. DALY:

Q. Who will pay for the construction of the tower?

MR. BADER: Objection, Mr. Examiner. It is a financial issue.

PRESIDING EXAMINER: Overruled.

THE WITNESS: The lessee.

BY MR. DALY:

Q. Who will maintain the tower, that is, keep it painted and keep it repaired? A. The additional part of the existing tower will be the responsibility of the lessee. If it is -- if it can be constructed.

Q. And if that has to have a light maintained on it, who will see that the light is maintained? A. They would be responsible. The lessee.

MR. BADER: Mr. Examiner, I object to this line of questioning.

PRESIDING EXAMINER: Overruled. She has already answered.

MR. DALY: That's all I have.

PRESIDING EXAMINER: Mr. Elyn?

MR. ELYN: Mr. Examiner, before I ask a few questions, I would like to have a ruling from the Examiner in connection with this. This is a little confusing to me, and that's why

[Tr. 605]

I would like to ask for a ruling.

PRESIDING EXAMINER: All right, certainly.

MR. ELYN: The issue that has been added speaks in terms of availability, and what I would like to find out is this: I notice in this lease option agreement the words "and shall not abridge prior rights of other lessees."

Now there may be other leases, other leases may speak about additional antennae, and the right of these lessees to object to additional antennae without their permission, and I am wondering if that would go to the availability of this particular proposal as far as its proposed use.

In other words, I would like to get into the question of what leases may be in existence at the present time, and what provision there may be in these additional leases concerning the obtaining of the permission of those lessees, concerning proposed new construction, and I am wondering whether that goes to the availability, actually, if there is a practical matter.

PRESIDING EXAMINER: Well, you have asked me, of course, a hypothetical question.

MR. ELYN: Yes, sir.

PRESIDING EXAMINER: I will give you a hypothetical answer. I think it does not go to the question of availability. Why I say that, and I indicated to Mr. Daly, if there is controversy between the various lessees and the landlord, or if, assuming

[Tr. 606]

that there is the grant of the application, and there is controversy between the building people and the applicant Milam and Lansman, or there is controversy between Milam and Lansman and other tenants, or between other tenants and the Continental people, they will have to resort to the court of competent jurisdiction, whether it is law or equity, to determine their rights.

[MR. ELYN:] But suppose, Mr. Examiner, the court would rule in such a case that the lessee, or those lessees that I am speaking of in my hypothetical case, would have the right to question the additional antenna? Then it would determine conclusively whether or not this proposal is available, actually, would it not?

PRESIDING EXAMINER: Well, that's rather remote and speculative, because you are getting into a question of property rights there, and I don't know the answer to that question.

MR. ELYN: May I ask the witness one or two other questions?

PRESIDING EXAMINER: Oh, yes, certainly.

MR. DALY: Mr. Examiner, may I suggest that you ask the question that you have in mind, and let the Examiner rule on it, because I would like to join in the exception, in your exception to the ruling, if the ruling is against you.

PRESIDING EXAMINER: I think, Mr. Daly, you had better

[Tr. 607]

permit Mr. Elyn to cross-examine. He may not want to do that. You had better let Mr. Elyn do his own cross-examining, and then if you have something further to add, I will be glad to hear you.

I have confidence in Mr. Elyn's ability to cross-examine the witness.

MR. ELYN: Thank you, Mr. Examiner.

MR. DALY: I beg his pardon, if he thought I was trying to run his case. I merely wanted to join in the exceptions.

[CROSS EXAMINATION]

BY MR. ELYN:

Q. Mrs. Tucker, can you answer that question for me? Is there any other outstanding lease covering the roof of the Continental Building?

MR. BADER: Objection, Mr. Examiner, irrelevant and to the extent that it might be relevant for some other purpose, there is enough testimony in the record as to who's going up there. This was in the December of 1964 sessions. I don't think we have to go into this at this time.

MR. ELYN: May I be heard on that?

PRESIDING EXAMINER: Yes.

MR. DALY: Excuse me, before you do that, may I join?

MR. ELYN: There may be reference in the record to other stations, but my question goes to whether or not the existence of any lease as far as these other stations are concerned,

[Tr. 608]

not to the question of whether or not there are other stations there.

MR. BADER: Mr. Examiner, I have objected. Was there a ruling?

PRESIDING EXAMINER: No, but I will overrule your objection. I want to hear this.

BY MR. ELYN:

Q. Can you answer that question for me, Mrs. Tucker?

PRESIDING EXAMINER: If you know. If you remember, you can testify. If you don't, why, say so.

THE WITNESS: If I understand the question correctly, you are asking if the additional tower facilities could be objected to by the other stations that are already existing?

PRESIDING EXAMINER: No, that's not his question. His question is: Are there other leases on the roof?

THE WITNESS: Would this break? Or infringe upon their leases?

PRESIDING EXAMINER: No, he asked you: Are there other leases for space on the roof? That's the question. Is that right?

MR. ELYN: Yes.

THE WITNESS: There are other stations. We have leases for other stations for antennas on the roof.

MR. ELYN: Fine.

THE WITNESS: We have three existing leases.

[Tr. 609]

BY MR. ELYN:

Q. Now my question, Mrs. Tucker, is this: Do those other leases have any provision, that you know of, naturally, whereby the permission of the lessee in each of those instances that you mentioned would have to be obtained in order for a new antenna to be constructed?

MR. BADER: I [object], Mr. Examiner. Same reason.

PRESIDING EXAMINER: Well, if she knows, she can answer. It is a legal question, or bordering on it. If she knows, from the lay plan, why, she can answer it. She may not know.

MR. DALY: Mr. Examiner, I would like to join in the objection. I think the best evidence [will] control that.

PRESIDING EXAMINER: Well --

THE WITNESS: I believe if you will refer to the option, on paragraph number one, "Lease will provide that use conform to all necessary governmental laws and regulations, and shall not abridge prior right of other lessees."

I think that would answer your question.

BY MR. ELYN:

[Q.] I think you testified, Mrs. Tucker, that the applicant in this particular case would have to pay the cost for the antenna that they are proposing?

MR. BADER: Mr. Examiner, I don't think that is a question, but I object to his going to a financial issue which doesn't exist.

PRESIDING EXAMINER: Well, it is overruled. She may

[Tr. 610]

answer.

THE WITNESS: I have no written agreement as to who shall pay the cost of anything.

MR. ELYN: I see.

THE WITNESS: But I can qualify that by saying that our building has no intention of paying the cost of anything.

BY MR. ELYN:

Q. Do you have any idea as to what the cost of that might be?

MR. BADER: Objection, Mr. Examiner.

THE WITNESS: I have none.

PRESIDING EXAMINER: Well, overruled. She has answered.

MR. ELYN: No further questions.

PRESIDING EXAMINER: Any further questions of this witness, gentlemen?

MR. BADER: I have no further questions.

PRESIDING EXAMINER: Mr. Daly?

MR. DALY: No, sir.

PRESIDING EXAMINER: Thank you very much, Mrs. Tucker.

(Witness excused.)

MR. DALY: Mr. Examiner, there were two other witnesses that were listed.

PRESIDING EXAMINER: Wait just a minute. You rest; is that right?

MR. BADER: Yes.

[Tr. 611]

PRESIDING EXAMINER: Very well.

MR. DALY: There were two other witnesses that were listed. We will not call our witnesses. We had determined in advance to a great extent as to what Mrs. Tucker's evidence would be, and had determined that we would not need them.

PRESIDING EXAMINER: All right. You may step down.

Anything further, then, gentlemen, in connection with this case?

MR. BADER: No, sir.

MR. DALY: Mr. Examiner, may we meet in your office, maybe about three o'clock on Monday, when Mr. Joyce will be back, and he is unable to be here today because of a death in his family.

PRESIDING EXAMINER: Yes, certainly.

MR. DALY: To determine future dates for closing the record, and so on.

PRESIDING EXAMINER: Well, the record is closing. I will close it today. What you had in mind was just to determine the dates for proposed findings and reply. Is that right?

MR. DALY: Right.

PRESIDING EXAMINER: There is nothing to keep us from closing the record today, is there?

MR. BADER: No, sir.

MR. DALY: No, sir.

[Tr. 612]

PRESIDING EXAMINER: Well, very well, then, I will close the record, and then counsel will meet in my office at three o'clock, Monday, to make determination as to the dates of proposed findings and conclusions, as well as replies, if any.

As a matter of fact, most counsel have their proposed findings ready, do they not?

MR. BADER: Believe it or not, I do have quite a bit of them.

PRESIDING EXAMINER: Mr. Elyn, how are you getting along?

MR. ELYN: The Broadcast Bureau's findings are complete -- except for this additional material, of course.

PRESIDING EXAMINER: How are you, Mr. Daly?

MR. DALY: I think Joyce is fairly complete. It is just a question of the other things that we have to catch up with.

PRESIDING EXAMINER: Very well. The record will be closed, the matter taken under advisement. I will see counsel Monday in my office.

Thank you, gentlemen.

MR. BADER: Thank you.

MR. DALY: Thank you.

MR. ELYN: Thank you.

(Whereupon, at 11:53 a.m., the hearing was concluded.)

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 23 1967

BRIEF FOR APPELLANT

Nathan J. Paulson
CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,123

CHRISTIAN FUNDAMENTAL CHURCH,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

LORENZO W. MILAM & JEREMY D.
LANSMAN, A PARTNERSHIP,

Intervenors.

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QUESTIONS PRESENTED

Pursuant to a Prehearing Stipulation filed, the parties agree that the following questions are presented in this appeal:¹

1. Whether in resolving the site availability issue the Commission committed reversible error by:
 - a. overruling appellant's objection to the admissibility of certain evidence;
 - b. restricting appellant's inquiry into matters pertaining to the site availability issue;
 - c. concluding that intervenor had met its burden of proof.
2. Whether in resolving the comparative issue the Commission failed to:
 - a. consider and properly weigh the record evidence;
 - b. act in accord with the Commission's established guidelines applicable in comparative proceedings;
 - c. follow its decisions in other comparative proceedings decided at approximately the same point in time.
3. Whether the Commission in view of all of the evidence, should have concluded that a grant of appellant's application and not intervenor's application, would better serve the public interest, convenience and necessity.

¹ Appellee and Intervenor do not necessarily agree with any factual or legal premise implicit in these issues.

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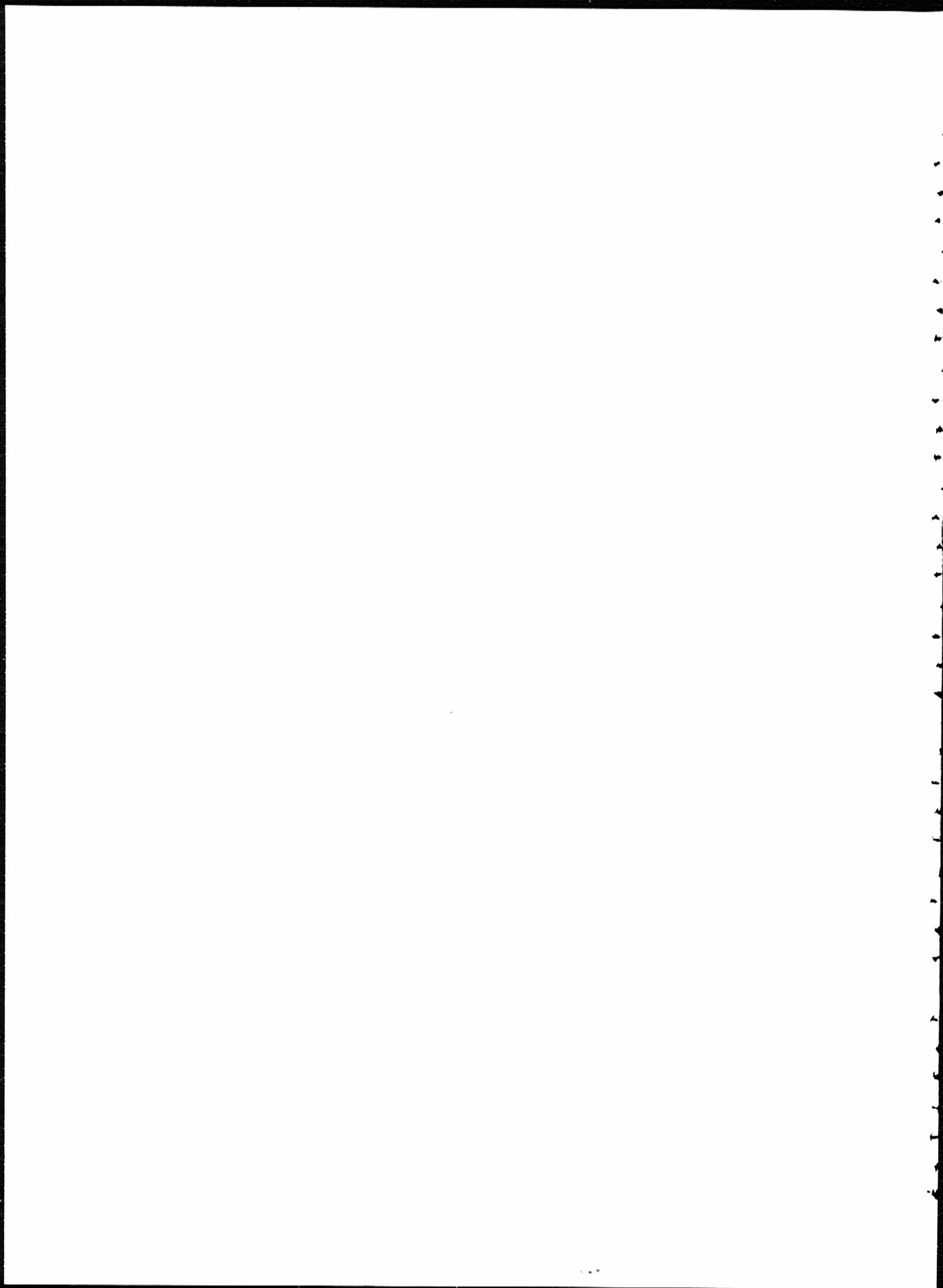
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,123

CHRISTIAN FUNDAMENTAL CHURCH,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

LORENZO W. MILAM & JEREMY D.
LANSMAN, A PARTNERSHIP,

Intervenors.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Christian Fundamental Church, taken pursuant to Section 402(b) of the Communications Act of 1934, as amended,

47 U.S.C. §402(b), and Rule 37 of this Court from (1) a Memorandum Opinion and Order of the Federal Communications Commission (FCC 66-652, released July 22, 1966) [R. 730-731];¹ (2) a Decision of the Commission's Review Board (FCC 66R-612, released December 28, 1966) [R. 649-662]; and (3) an Order of the Commission (FCC 67-655, released June 8, 1967) [R. 784] which (a) denied Appellant's application for a construction permit for a new FM broadcast station at St. Louis, Missouri; (b) held that Intervenor, Lorenzo W. Milam and Jeremy D. Lansman, a Partnership, had met its burden of proof under a specified issue inquiring into the availability of Intervenor's proposed antenna site for the use intended; and (c) granted, on a comparative basis, the application of Intervenor, which application is mutually exclusive with Appellant's, and which proposes, also, an FM broadcast station at St. Louis, Missouri. The Notice of Appeal was filed in this Court by Appellant on July 7, 1967. The Court granted Appellant's request to extend the time for filing this Brief to October 23, 1967.

STATEMENT OF THE CASE

Appellant and Intervenor are applicants for the same FM frequency in St. Louis, Missouri [R. 649-50]. The Appellants are long-time residents of St. Louis working there as teachers and ministers [R. 513-15]. Intervenor is two partners, Milam and Lansman. Mr. Milam will not either live in St. Louis or operate the station there if granted a permit [R. 733]. Mr. Lansman, a 50% partner, spent some of his growing years in St. Louis but left at about age 15 [TR. 127-28]. Mr. Lansman spent some 2 years working at radio stations, mainly as an engineer and most of the time at KRAB Seattle, Washington, a part time station, without regular salary [TR. 90, TR. 132].

The Appellants made a survey to determine listener needs before filing its application; the Intervenor did not [R. 739].

¹ Citations given as "R. ____" are to the Record filed with this Court.

The Appellant's proposed programming places emphasis upon religious and educational programs [R. 421-523]. Intervenor's proposed programming, to a great extent, is similar to the format of Station KRAB, Seattle, Washington [R. 532].

The Commission has a written policy detailing the guidelines to be followed in cases wherein a decision must be based on comparisons of applicants, as in the instant case. [Policy Statement on Comparative Broadcasting Hearings, 5 Pike & Fischer RR 2d 1901 (1965)]. On integration of ownership and management, the Appellant's three principals each will be at their station on a daily basis as general manager, station manager, and program director, but should the Intervenor receive a permit, only one of the two partners will be at their station. On diversification of mass communications, one of the two Intervenor holds an interest in a station in the state of Washington, while the Appellant's principals have no interest in any media of mass communications. The evidence also showed that the Appellant had a greater service area than the Intervenor. This became very important. Appellant proposed 62.5 kw of power against 29.2 kw for the Intervenor. However, with less than 50% of the Appellant's power, the Intervenor would serve 80% of the Appellant's service area. It developed that the proportional difference in coverage resulted from the greater antenna height proposed by the Intervenor. If they could build a supporting tower to get the added height, they would serve 47,000 persons less than Appellant [R. 737]. If Intervenor could not build the tower the area and population they would serve would be even less. Intervenor could obtain this height only if they could place a 116' tower on the roof of a 277 foot building. This became a special issue, and the Appellants claimed the Intervenor did not bear their burden of proof on this issue; the Intervenor claimed they did.

It is important to note that the Appellant will provide over 24,000 persons with a third FM service, while Intervenor would provide a third FM service to less than 1,000 persons [R. 516].

On these facts progression through the Commission was as follows:

1. The Examiner awarded the construction permit to the Appellant, on the comparative issue, after finding the Intervenor had reasonable assurance for the use of a site on which to build and place its antenna [R. 508-534].
2. The Review Board, the first time the matter was before it, found the Intervenor did not have reasonable assurance with respect to the availability of Intervenor's site, and making no other findings, left the permit with Appellant, for if Intervenor have no site they are effectively disqualified [R. 649-661].
3. On appeal by the Intervenor to the full Commission, the Commission decided there was reasonable assurance that the Intervenor would have available its proposed site. They returned the case to the Review Board [R. 730-731].
4. The Review Board, with the case in hand a second time and with the site question out of its reach, thought, on a comparative basis, the permit should be given to the Intervenor. The vote was two to one [R. 732-747].
5. All of these matters were finally appealed to the Commission, including the questions on the site. The Commission upon review refused to disturb the decisions in the case. This left the Intervenor the successful applicant [R. 784].

This appeal followed.

STATUTE INVOLVED

The relevant section of the **Administrative Procedure Act**, 5 U.S.C. §557(c) is as follows:

Initial decisions; conclusiveness; review by agency, submissions by parties; contents of decisions; record.

(c)

* * *

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

STATEMENT OF POINTS

1. Since the Commission's decision on the site issue failed to state the basis for its rejection of its Review Board's contrary findings and conclusions, or the basis for its own decision, its decision is legally inadequate.

2. The record does not support the Commission's decision that Intervenors met their burden of proof on the site issue.

3. The Commission erred as a matter of law in failing to rule upon Appellant's Exceptions to the Hearing Examiner's Initial Decision, respecting the site issue, where the Review Board in its decision had granted those Exceptions and where the Commission reversed that Review Board decision.

4. Since the Commission's decision on the comparative issue failed to set forth all evidence of decisional significance, both pro and con for each applicant, it is fatally defective.

5. Certain ultimate findings of fact in the Commission's decision on the comparative issue are irrational inferences from proper findings of basic fact.

6. The Commission's Decision, on the comparative issue, is contrary to Court and Commission precedent and contrary to its Policy Statement on Comparative Broadcast Hearings and the norms set forth therein, and contrary also to the spirit of the precedents and the Commission's promulgated Policy Statement.

SUMMARY OF ARGUMENT

Appellant, in its Argument, *infra*, urges this Court to reverse and remand this case to the Federal Communications Commission for errors of decisional significance respecting (1) its conclusion that Intervenor had met its burden of proof under the site issue; and (2) its conclusion that, on a comparative basis, a grant of the application of Intervenor will better serve the public interest. Since, to a great extent, separate arguments are relied upon with respect to each, they will be summarized separately.

The Site Issue

I.

The Commission's Memorandum Opinion and Order [R. 730], reversing its Review Board and deciding that Intervenor met its burden of proof under the site issue is legally inadequate in that the Commission fails to state the basis upon which it rejected its Review Board's analysis of the evidence, and fails to state, also, the basis of its own decision.

The Review Board's decision disqualifying Intervenor for failure to meet its burden under the site issue, and granting Appellant's application [R. 649-62] sets forth detailed background information on the site proposed by Intervenor, the reasons why the availability of Intervenor's

site was placed in issue; a careful, rather lengthy analysis of all evidence of record pertaining to Intervenor's proposed site; and the reasons and basis for its ultimate findings and conclusions [*infra*]. There can be no doubt that the decision of the Review Board was based upon substantial evidence.

In sharp contrast to the Review Board's carefully reasoned decision, however, is the Commission's Memorandum Opinion and Order reversing that decision. The Commission sets forth only bare conclusions [R. 730-731]. It makes no findings or ultimate findings, and sets forth no reasons or basis for its conclusion. It does not refer to any evidence which was not examined, thoroughly, by its Review Board.

Such a casual decision by an administrative agency, especially when it reverses its own board where the board has set forth a reasoned analysis of the problems and grounded its decision upon substantial evidence, cannot be sustained either under the provisions of the Administrative Procedures Act, 5 U.S.C. §557(c), or the Decision of the Courts.

II.

There is no evidence upon this record to support the Commission's bare conclusion that Intervenor had met its burden under the site issue.

Intervenor proposes that its antenna system be mounted upon either (the record is unclear) a 60 foot extension of an existing 56 foot structure atop the Continental Building in St. Louis, Missouri, or on a separate structure of 116 feet on the roof of the building [R. 653]. In either case substantial construction would be required to accommodate such an antenna system.

In enlarging the issues to include a site issue against Intervenor, the Review Board, while stating that a binding agreement for such use of the building was not necessary in order to establish antenna site availability, determined that a site issue was necessary because of the extensive alterations proposed by Intervenor on the roof of the Continental

Building, the fact that approval of the plans is a pre-requisite of the use of the roof, and that such approval has not been received, and that there was no reasonable assurance of approval of that construction [R. 420].

The only evidence of record respecting the site issue, supplied by Intervenor, to meet its burden, consisted of a so-called "lease-option agreement" (which Appellant contends is no agreement at all — see *Argument*, Part II, *infra*) and the testimony of Intervenor's only witness Miss Tucker, a rental agent for the Continental Building [R. 651]. Such evidence gives no assurance — let alone reasonable assurance — that Intervenor's proposed site is available to it for its proposed use. Correctly, the Review Board found that the problems respecting the site when the issue was added were not in any way solved by either the lease-option agreement or Miss Tucker's meager testimony [R. 654].

An examination of the Review Board's decision establishes that it was based upon the record in the case, and therefore such had to be considered by the Commission. However, not only did the Commission not challenge or discuss the findings or the ultimate findings of its Review Board, but it offered no substitute findings or ultimate findings of its own. Failing to point to any substantial findings of basic fact upon which to support its conclusion, the Commission's decision, therefore, must fall for lack of support by substantial evidence of record on the whole.

III.

At hearing, respecting the site issue, the Hearing Examiner sustained objections by Intervenor to attempted cross-examination of Miss Tucker by Appellant, to: determine whether certain sketches presented Miss Tucker by Intervenor were at variance with that proposed construction which Intervenor showed in its application; attempt to establish the impossibility of getting a permit to extend the height of the existing tower

of the Continental Building; and to inquire into any rights of the present lessees having antenna facilities on the roof, to object to Intervenor's proposed construction [R. 652-653 incl. note 6]. Exceptions covering the foregoing were granted by the Commission's Review Board in its decision disqualifying Intervenor for failure to meet its burden of proof under the site issue [R. 650; 656]. The Commission in reversing its Review Board failed to make any reference, whatever, to these exceptions. It is impossible on this record, therefore, to determine whether the Commission upheld the rulings of its Hearing Examiner, or whether it upheld the rulings of its Review Board. At any rate failure by the Commission to rule on such exceptions requires reversal and remand.

The Comparative Issue

In its decision on the comparative aspects of this case, the Commission in preferring Intervenor over Appellant, erred as a matter of law in 1) picking and choosing evidence to support its conclusion rather than considering all evidence pro and con with respect to both applicants; 2) reaching ultimate facts which were not rational inferences from proper findings of basic fact; and 3) reaching an ultimate conclusion without due regard to the decision of its Hearing Examiner; contrary to the guidelines set forth in its Policy Statement on Comparative Broadcast Hearings, 5 Pike & Fischer RR 2d 1901; and, inconsistent with Commission and Court precedents.

IV.

In setting forth its findings and ultimate findings respecting the background, experience and proposed integration of ownership and management of Intervenor, the Commission fails to consider any adverse evidence in this regard respecting Intervenor.

The Commission finds, correctly, that Mr. Milam, a 50% partner in Intervenor does not propose local participation in the operation of the

St. Louis station, and, therefore, his background and broadcast experience are of little or no significance [R. 738]. It concludes, correctly, that the background and experience of Intervenors' other partner, Mr. Lansman, is the person to whom the Commission must look for sensitivity to the changing needs of the residents to be served by the proposed FM station and programming designed to meet those needs [R. 738]. Although Mr. Lansman will be the station manager as well as chief engineer, he represents only a 50% integration because his partner will not participate in the station's operation. The "extensive", "substantial" and "diverse" broadcast experience which the Commission thought Mr. Lansman possessed is simply not borne out by the facts, nor is he familiar with St. Louis.

For example, the Commission fails to take into consideration the following facts: at the time of hearing Mr. Lansman was only 22 years of age [R. 512]; he has never been and is not now employed at St. Louis [TR. 138]; he has not been and is not now a member of any St. Louis civic, social or fraternal organization [TR. 91]; he was not born in St. Louis but moved there at an early age and departed from St. Louis at the age of 15 [TR. 88]; the return visits to St. Louis by Mr. Lansman were to visit his father, but his father no longer resides at St. Louis but now resides in California [TR. 88]; Mr. Lansman has made no plans for residence at St. Louis if Intervenor's proposed station is granted and might well live at the Station [TR. 100-101]; Mr. Lansman's combined broadcast experience at an operating broadcast station is a total of approximately two years duration; he acquired most of his experience at Station KRAB, Seattle, Washington, where he did not consider his position as "employment", but that of a "semi-volunteer" [TR. 132]; Mr. Lansman has no financial investment at stake in Intervenor's proposal [TR. 244]; and, he has had no sales or managerial experience [TR. 121].

Failure to take into consideration these adverse findings results in a distorted record of the qualifications of Intervenors and is at direct

odds with the requirements set down by this Court, that one of the essentials for a legally valid decision in a comparative case before the Federal Communications Commission is that a final conclusion must be reached upon a composite consideration of the findings as to the several differences in the applicants, pro and con for each applicant. Had the Commission considered these adverse findings, it would have had to conclude that Mr. Lansman is ill-equipped to become the general manager of the proposed station.

Respecting the proposed integration of ownership and management of Appellant, the Commission concludes that the present duties of the three principals of Appellant will preclude any substantial participation by them in the station's operation on a daily basis. Each of Appellant's principals will be the department heads of the three major departments of the station — general manager, station manager, program director. The record is clear on the exact duties each will perform in connection with his position [R. 352]. There is no evidence of record that each will not be able to perform those duties and the only evidence is that such duties will be performed and that each will devote as much time as is necessary to the station to perform those duties.

V.

The ultimate findings of fact reached by the Commission in its decision respecting the comparative aspects of this case are not rational inferences from proper findings of basic fact.

Respecting integration of ownership and management, if all evidence, both pro and con, is considered respecting Appellant and Intervenor the only ultimate finding that can be squared with this record is that Appellant is to be preferred over Intervenor, for while Appellant is 100% integrated, Intervenor is only 50%; while Appellant's principals demonstrate familiarity with area needs and desires, in view of their background and long-time residence in St. Louis, Intervenor's principals

are strangers to St. Louis -- Milam never having lived there, and Lansman having left St. Louis at the age 15. Appellant, therefore, gives greater assurance than Intervenor that the proposed station will be operated in the public interest.

Respecting program planning, the Commission concludes, ultimately, that neither Appellant nor Intervenor is to be given a preference or a demerit [R. 741]. The basic fact, however, is that Intervenor should have received, as the Commission's Policy Statement states, a "serious deficiency" in that the record is barren of any programming contacts made by Intervenor prior to the formation of its proposed programming schedule, and thus it gives no assurance whatever that such schedule was designed to meet area needs and interests.

At paragraph 23 of its decision [R. 741-742], the Commission finds, ultimately, that the record evidence gives no basis for concluding that the past broadcast record of Station KRAB, Seattle, Washington (in which Intervenor has an interest), is a poor one. It does so without setting forth any findings whatever with respect to the operation of that station, despite the fact that there is an abundance of evidence upon this record respecting the operation of that station. For this reason alone, the case must be reversed and remanded. Throughout the proceeding Appellant has maintained that the operation of KRAB is poor, basing that allegation on the following facts, among others: the station is a part-time station, having no afternoon programming [TR. 235-236]; the station only employs two paid staff members [TR. 218]; although assigned to the commercial broadcast band, it broadcasts no commercial spot announcements and relies upon revenues obtained exclusively from the sale of a program guide [TR. 249-250]; it broadcasts no news programs -- local, regional, national or international [TR. 234-235]; and it has no wire service [TR. 218]. In view of these facts, at the very least the Commission erred in concluding that the operation of the station was not "poor" without explaining the evidence upon which it relies to make such an ultimate finding.

VI.

The Commission's ultimate decision on the comparative issue is contrary to the Commission's stated policy respecting comparative broadcast hearings and contrary to Court and Commission precedents.

In its Policy Statement on comparative broadcast hearings, 5 Pike & Fischer RR 2d 1901, 1908, the Commission indicates that in comparing mutually exclusive proposals it looks to two primary objectives, to wit: the best practicable service to the public, and the maximum diffusion of control of media of mass communications. The evidence of record on the whole establishes that a grant to Appellant will better achieve both those objectives.

Respecting diversification of control of mass media of communications, Appellant must be preferred since it has no interest in any broadcast station or media of mass communications, whereas Intervenor at the time of hearing had an interest in one broadcast outlet (KRAB, Seattle, Washington) and since that time has obtained an interest in an additional one. [KBOO (Educational FM), Portland, Oregon, granted June 14, 1967; File number at Federal Communications Commission, BPED-707].

Respecting best practicable service to the public, Appellant proves superiority in the elements to which the Commission looks to achieve that goal. Concerning the element of integration of ownership and management, all three principals of Appellant will be on the scene and maintain absolute control of the operation of the station, on a daily basis, while Intervenor is only 50% integrated. Respecting efficiency, Appellant will provide service to almost 50,000 more persons than will Intervenor of which about 24,000 presently receive only two FM services [R. 737]. Respecting program planning, Appellant's showing is at least adequate, while Intervenor must receive a demerit with respect thereto [*supra*]. The poor broadcast record of Station KRAB further detracts from Intervenor's showing for it evidences what the Commission might

expect at Intervenor's proposed St. Louis station. Appellant proposes superior programming service, and, in this regard, the Commission erred as a matter of law in not making findings and conclusions with respect thereto since proposed programming was in issue [R. 509], and both Intervenor and Appellant throughout the proceeding maintained that its proposed programming was superior to the other, and the Commission so found [R. 739]. The Commission acknowledged that the programming proposals of Appellant and Intervenor are "markedly different" [R. 741] but concluded that no comparison was appropriate [R. 741]. However, since findings must be made with respect to every difference between comparative applicants except those which are frivolous and wholly insubstantial, when advanced by one or more of the parties, failure of the Commission to make such comparison is reversible error.

ARGUMENT

The Site Issue

I.

THE COMMISSION MEMORANDUM OPINION AND ORDER REVERSING ITS REVIEW BOARD ON THE SITE ISSUE IS LEGALLY INADEQUATE

In reversing its Review Board respecting the disqualification of Intervenor for failure to meet their burden under the site issue, the Commission failed to state the basis upon which it rejected its Review Board's analysis of the evidence, and failed to state, also, the basis for its own decision. Accordingly, the Commission's determination of the site issue is legally inadequate and this case must be reversed and remanded to the Commission. [*Retail Store Employees Union v. NLRB*, 123 U.S. App. D.C. 360, 360 F.2d 494 (1965); *Oil, Chemical and Atomic Workers International Union v. NLRB*, 124 U.S. App. D.C. 113, 362 F.2d 943 (1966); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 117 (1941); *Lorain Journal Co. v. FCC*, 122 U.S. App. D.C. 127, 351 F.2d 824 (1965); Administrative Procedures Act, 5 U.S.C. §557(c) (1966)].

Proper disposition of the site issue is critical to the ultimate conclusion of which application is to be granted. First, it goes to the basic qualifications of Intervenor, and failure to meet the issue results not only in the denial of Intervenor's application, for lack of basic qualifications, but results, also, in the grant of Appellant's application, for Appellant has been found to be basically qualified in all respects [R. 650]. Second, the proposed service to be rendered by Intervenor is predicated upon the assumption that its antenna can be and will be erected at the precise location proposed, for, as will be shown *infra*, proposed coverage of an FM station depends not only upon the power proposed, but the height of the proposed antenna system. The greater the height of the antenna, at a given power, the greater is the resulting coverage. In this proceeding the power proposed by Intervenor is less than half of the power proposed by Appellant, yet Intervenor's proposed coverage area is only 20% less than Appellant's due to the height factor [R. 529]. Intervenor propose either (the record is unclear) to extend the height of an existing 56 foot water tower to 116 feet or to build a 116 foot tower on the roof of the Continental Building. The site issue questions whether there is reasonable assurance that Intervenor can accomplish such construction [R. 650-651; 654]. If no such assurance is established, no conclusion can be reached respecting the areas and populations which would be served by Intervenor's proposal, and, there can be no legitimate conclusion drawn in the important comparative category of efficient use of the frequency. And of great importance to the Appellant is the fact that if Intervenor's antenna cannot be built as high as they propose, their proposed coverage is reduced probably to a point of serious decisional significance. The question raised at this point is on the legal adequacy of the Commission's Memorandum Opinion and Order [R. 730-731] which reversed the Review Board's decision in this regard [see *Retail Store Employees Union v. NLRB*, *supra*] and remains uncorrected to this date.

In reversing its Review Board's seven page decision disqualifying Intervenor on the site issue, the Commission, in its very short

Memorandum Opinion and Order gave as its sole reasons for reversal the following bare conclusions [R. 730-731]:

"3. . . . To meet its burden on this issue, M & L introduced into evidence a lease-option agreement between it and the owners of the building on which it proposed to locate its antenna. This document was signed by Miss Thelma M. Tucker, the building rental agent, on behalf of the owners of the building after receipt of sketches from M & L disclosing their construction plans . . .

"4. . . . We have carefully examined the record evidence in this case and are of the view that M & L has demonstrated reasonable assurance that the antenna site proposed by it is available for its use. We conclude, therefore, that M & L has met its burden of proof on this issue. The decision of the Board majority to the contrary is reversed."

Clearly, the foregoing is legally inadequate, since the Commission makes no findings, sets forth no analysis of the facts, and gives no reasons *why* it reached the decision it did. The Commission does not mention or refer to any evidence or principle of law which was not thoroughly examined and analyzed by its own Review Board.

The Review Board agreed fully that absolute finality is not necessary to establish site adequacy [R. 651]:

"The Board's opinion, in this regard, does not mean that a binding agreement is needed to demonstrate site availability. Commission requirements are satisfied when an applicant proposes a site with reasonable assurance in good faith that the site will be available for the intended purpose."

The only evidence referred to by the Commission was the "lease-option agreement" and the testimony of Miss Tucker. That document and that testimony were covered extensively by the Review Board, but whereas the Review Board *explained why* this evidence was inadequate to meet the site availability issue, the Commission merely makes reference to such evidence, and, without any discussion, analysis, or reason,

asserts merely the bare conclusion that it has examined that record evidence "and [we] are of the view that [Intervenor] has demonstrated reasonable assurance that the antenna site proposed by it is available for its use. . . . The decision of the Board majority to the contrary is reversed" [R. 731]. Such a bare conclusion falls far short of the requirements placed on administrative agencies by Congress and the Courts.

The Administrative Procedure Act requires *all* decisions of administrative agencies to include findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record [5 U.S.C. §557(c)]. Clearly, the Federal Communications Commission did not do this in this case. Its decision, therefore, is contrary to law.

In *Retail Store Employees Union v. NLRB*, *supra*, this Court considered and remanded a case analogous to this one. In *Retail Store*, the Trial Examiner, after setting forth the evidence of record, discussed the evidence, reached ultimate facts, and concluded that there existed a conspiracy to violate a statute. In reversing the Examiner, the National Labor Relations Board concluded:

"Contrary to the Trial Examiner, we believe the facts and circumstances on which he relies to find the unlawful purpose and design do not on the record as a whole support a finding of a conspiracy on the part of the Respondent - Company and the Joint Board to violate the act."

In remanding the case, this Court, while stating that an agency which *supports* a decision of a delegated authority may do so summarily, provided there is substantial evidence to support the findings of the delegated authority, went on to say [123 U.S. App. D.C. 360, 361-362]:

"But here the Board [the NLRB] has done no more than simply state its belief the facts and circumstances relied upon by the trial examiner do not on the record as a whole support the conspiracy

findings. They do indeed support the conspiracy findings. We realize, however, that the question now is not whether there is substantial evidence to support the trial examiner's findings, as clearly is the case, but the legal adequacy of the Board's decision which differs from his . . . [the Board] leaves this Court without the help necessary for review To perform our function we are entitled to more help from the Board in order to intelligently pass judgment upon its decision."

Here, also, this Court is entitled to more help than is given it by the Commission. The Commission has not provided this Court the basis for its decision nor the basis for rejection by the Commission of the reasoned decision of its Review Board.

This Court has made clear that it is the Commission itself which is responsible for Commission decisions, and not delegated authorities within the Commission, and when as here the Commission reaches different findings than the delegated authority, the Commission must give an adequate showing of the basis on which it rejected that delegated authority. [*Lorain Journal Company v. FCC, supra; Retail Stores Employees Union v. NLRB, supra*].

In *Oil, Chemical and Atomic Workers International Union v. NLRB, supra*, this Court sustained a decision of the NLRB where the Board had overruled its Trial Examiner, but the Court, citing the *Retail Store* case, *supra*, stated:

"The Board cannot satisfy its statutory function merely by stating that it disagrees with a Trial Examiner. It must make clear the basis of its disagreement. Its decision must be presented in such form as to enable this Court to pass intelligently on that decision, and to determine whether it is rationally related to findings and supported by substantial evidence."

The Supreme Court, in *Burlington Truck Lines, Inc. v. United States, supra*, held that it and the Administrative Procedures Act requires Administrative Agencies to base their decisions on more than mere conclusions. The Court stated at page 167:

"There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedures Act will not permit us to accept such adjudicatory practice."

Again, in *Phelps Dodge Corp. v. NLRB*, *supra*, at page 197, the Supreme Court emphasized that an Administrative Agency must "disclose the basis of its order . . . [and] give clear indication that it has exercised the discretion with which Congress has empowered it." This Court in *Spiegel v. Public Utilities Commission of the District of Columbia*, 96 U.S. App. D.C. 307, 236 F.2d 29 (1955), a case involving a rate increase for Capital Transit, remanded the case because the Commission had failed to provide this Court with its reasons for the course it decided to follow. In the words of the Court, the Commission failed to set forth a "suitably complete statement of its reason for its conclusions."

The Federal Communications Commission had this matter before it twice and twice failed to give an explanation for reversing its Review Board on the site issue. The Court is entitled to that *explanation*, and without it this Court is unable to pass judgment *intelligently* upon the Commission decision. [*Retail Store Employees Union v. NLRB*, *supra*, *Oil Chemical and Atomic Workers International Union v. NLRB*, *supra*, *Burlington Truck Lines v. United States*, *supra*; *Burinskas v. NLRB*, 123 U.S. App. D.C. 143; 357 F.2d 822 (1966); *Melody Music Inc. v. Federal Communications Commission*, 120 U.S. App. D.C. 241, 345 F.2d 730 (1965); *Telanserphone Inc. v. FCC*, 97 U.S. App. D.C. 398, 231 F.2d 732 (1956)].

Accordingly, and considering, only the legal inadequacy of the Commission's decision on the site issue, for failure to give the basis for its decision and the basis for rejecting the decision of its Review Board, this case must be reversed and remanded to the Commission.

II.

THE COMMISSION MEMORANDUM OPINION AND ORDER IS
NOT SUPPORTED BY SUBSTANTIAL EVIDENCE; THE
RECORD ON THE WHOLE REQUIRES DISQUALIFICATION
OF INTERVENOR FOR FAILURE TO MEET ITS BURDEN
UNDER THE SITE ISSUE

In addition to being patently defective for failure to set forth the basis for determination of the site issue, and the basis for reversing the Review Board's decision in this regard, there is no substantial and in fact no evidence, on the record as a whole, to support the Commission's bare conclusion that Intervenor's have met their burden under the site issue. That is to say, not only did the Commission not state the basis for its conclusion respecting the site issue, but this record can not justify such a conclusion favorable to Intervenor's. Accordingly, Intervenor's are disqualified as concluded by the Commission's Review Board [R. 649-661].

In order to place in proper perspective the scope of the site issue in this proceeding, the evidence of record with respect thereto, and the reasons for the decision of the Review Board in disqualifying Intervenor's, it is necessary to examine the record evidence respecting Intervenor's' proposed site. Intervenor's propose either to increase the height of an existing structure (an old water tower) to 116 feet, or, to build a separate structure of 116 feet with the existing structure still on the roof (the Record is still unclear which alternative Intervenor's propose to do [R. 653]).

It is important to note that there was no issue respecting the availability of the site proposed by Appellant, and there has been no allegation from any source, at any stage of this proceeding, that Appellant does not have authority from the Continental Building to mount its antenna on the existing structure on the roof.

The Intervenor's could not serve nearly so many people if their antenna has to sit on the roof should this 116 foot structure be impossible.

This can be very important on a comparative basis, for the coverage specified by Intervenor would be something different from that proposed, if it could not construct the 116 foot tower. A comparison of proposed service areas is an important element in determining which applicant is to be preferred [Commission's "Policy Statement on Comparative Broadcast Hearing," 5 Pike & Fischer RR 2d 1901, 1913]. Accordingly, when the Review Board, upon petition of the Commission's Broadcast Bureau enlarged the issues herein to include a site availability issue against Intervenor, there came into question not only the basic qualifications of Intervenor but its comparative qualifications as well.

In enlarging the issues to include a site issue against Intervenor, the Review Board noted that one Miss Tucker, rental agent for the Continental Building (by correspondence in reply to an inquiry by Commission's Broadcast Bureau) indicated that she had not given anyone the right to *construct* a tower or *add to* the existing tower on the roof of the Continental Building; that she did not have the authority to grant such permission; and that such authority could not be authorized without submitting sketches and engineering data respecting such construction [R. 651]. The Review Board conceded that a binding agreement was not necessary in order to establish site availability and that only reasonable assurance was required, citing *Beacon Broadcasting System, Inc.*, 21 Pike & Fischer RR 727 (1961); and added the site issue for the following reasons [R. 651]:

"... Because of the extensive alterations which Milam and Lansman [Intervenor] propose to make on the roof, together with the fact that approval of the plans is a pre-requisite to the use of the roof, and since it is not clear that the roof of the Continental Building is available to Milam and Lansman, Milam and Lansman have not demonstrated satisfactorily that there is reasonable assurance of the approval of said construction, and an issue will therefore be added to determine the availability of the specified site for the use proposed. . . ."

Appellant emphasizes that the Review Board, in enlarging the issues, did so since there was not *reasonable assurance* of "approval of the [construction] plans . . . a pre-requisite to the use of the roof" [*supra*].

The evidence of record respecting the site issue supplied by Intervenor to meet its burden consists only of a so-called "lease-option agreement" and the testimony of Miss Tucker (the same rental agent referred to above) [R. 651]. This evidence gives no assurance — let alone reasonable assurance — that Intervenor's proposed site is available to it for its proposed use. In the words of the Review Board in its decision disqualifying Intervenor for failure to meet its burden under the site issue:

" . . . the Milam and Lansman antenna proposal stands precisely as it did when the Board added the site issue . . . At that time (a) it appeared that extensive alterations were required on the roof in connection with either (1) the dismantling of an existing tower and the erection and guying of a new one or (2) a sixty foot addition with guying, to the existing tower; (b) authority to effect the required alterations had not been secured; and (c) such authority could not be granted by the building's rental agent (Miss Tucker)."

Neither the Commission nor the Intervenor have attempted to explain away or even direct their attention to these problems confronting Intervenor.

In reaching these ultimate facts and conclusions the Review Board carefully examined all evidence of record, including the following summary of unimpeached testimony of Miss Tucker: she would have to have further authority from the owners of the building before a tower could be constructed on the roof; she did not know whether a building permit would be necessary for the construction of the tower; she was not familiar with zoning regulations; and, she did not, in fact, have an opinion whether a 116 foot structure could possibly be placed on the building. In this latter connection she testified "the additional part of the existing tower will be

the responsibility of the lessee. It is — *if it can be constructed*"[R. 653, including footnote 7].

There simply is not one shred of evidence upon this record which possibly could support a conclusion that Intervenor has met its burden under the site issue. The Hearing Examiner found that Intervenor had met its burden, but like the Commission, failed to state the basis for his decision. His findings are most brief [R. 527]. He makes no attempt to analyze the findings, and he does not discuss the findings [*Ibid*]. His finding that Miss Tucker "concluded that her principal stood ready to carry out the terms of the lease agreement in the event its terms are consummated" [*Ibid*] has no foundation or support in the record and the Review Board so found [R. 653]. Moreover, such a "finding" merely begs the question for the terms to be consummated would have to be consummated by the owners of the building and not by Miss Tucker as she readily admitted in her testimony [R. 653]. The Hearing Examiner's conclusions [R. 528] fail to state the basis for those conclusions and therefore are legally inadequate [see Part I of Argument].

There is no evidence upon the record which would imply that there is assurance that Intervenor's site is available to it for the use proposed. This the Review Board found and therefore that had to be considered by the Commission [*Universal Camera Corporation v. NLRB*, 340 U.S. 474 (1951)]. Not only did the Commission not challenge or discuss the findings of the Review Board, but it offered no substitute findings or ultimate findings of its own. Therefore, it is defective for failure to set forth findings of basic fact supported by substantial evidence of the record on the whole [*Star of the Plains Broadcasting Co. v. FCC*, 105 U.S. App. D.C. 352, 267 F.2d 629; *Television Corporation of Michigan, Inc. v. FCC*, 111 U.S. App. D.C. 101, 294 F.2d 730 (1960); *Spiegel v. Public Utilities Commission of the District of Columbia*, *supra*; *Braniff Airways, Inc. v. CAB*, 113 U.S. App. D.C. 132, 306 F.2d 739 (1962); *United States v. Carolina Freight Carriers Corporation*, 315 U.S. 475, 488-89 (1942); *Burlington Truck Lines v. United States*, *supra*].

The argument, *supra*, has assumed *arguendo*, that the so-called "lease-option agreement" [R. 431-432] was correctly received in evidence, but that, as the Review Board found and concluded, that it was a meaningless document insofar as meeting the site issue was concerned [R. 654]. Appellant agrees that the document was meaningless, but for this reason, and others, *infra*, it has been and is now Appellant's position that the Commission erred as a matter of law in receiving that document in evidence [R. 1049].

The document entitled "lease-option agreement" is a nullity. Not only is it irrelevant since its terms give no assurance whatever that the construction required will be approved, but by its own terms it merely looks to a subsequent agreement which is to contain terms not yet agreed upon by the parties [R. 431-432]. Moreover, it is incompetent, since Miss Tucker, by her own admission, would not have the authority to sign for the owners of the building on the future lease contemplated by the document [TR. 568].

In *Hansen v. Catsman*, 371 Mich. 79, 123 N.W. 2d 265 (1963), an "agreement" in issue stated that the lessor contemplated the erection of a building and that the lessee contemplated the lease of that building for use as a drug store. Approximate dimensions were set forth (here there are not even any approximate dimensions) with the proviso that the building was to be erected in accordance with plans and specifications and design not as yet formalized. The Court held that there was no agreement at all since the "agreement" lacked certainty and was dependent upon a future agreement on matters not specified in the initial "agreement." It held that in order to bind themselves to prepare and execute a subsequent agreement, the parties had to agree with some specificity to all essential terms to be incorporated in the subsequent agreement. It is respectfully submitted that a parallel situation is present here, and that the Court should conclude that the "lease-option agreement" is a nullity and that its receipt in evidence was error.

Nor can it be assumed, either from the evidence, or by logic, that the construction proposed could be accomplished or that the owners of the building would not object to such construction. The construction proposed by Intervenor is very substantial. The height, above ground, of the Continental Building itself is only 277 feet [R. 20]. The tower Intervenor proposes therefore would be *over one half the height of the building itself!* This being so, it is not surprising that a site issue was added, but it is surprising that knowing that the Commission questioned such construction, Intervenor came forth at hearing only with a vague, meaningless and irrelevant document entitled "lease-option agreement" and brought as its only witness Miss Tucker, who admittedly could not approve any construction plans, and who, referring to the proposed tower, said ". . . if it can be constructed" [R. 653, footnote 7]. It must be assumed that Intervenor came forward with the best evidence it could (for it knew that failure to meet its burden under the site issue would result in disqualification). Why then did it not place in evidence its construction plans? Why did it not offer in evidence some indication that the *owners* of the building would permit such construction on the building? Why did it rest its case on the testimony of a witness it knew could not approve the contemplated construction? None of these questions are answered upon this record. A fair conclusion is that such was not done for it could not be done. And why did Intervenor object to Appellant's questions along this line?

III.

THE HEARING EXAMINER ERRED AS A MATTER OF LAW IN SUSTAINING OBJECTIONS BY INTERVENORS TO CROSS EXAMINATION QUESTIONS BY APPELLANT

In its Memorandum Opinion and Order reversing its Review Board and concluding that Intervenor had met its burden under the site issue, the Commission not only failed to state the basis for its decision or the basis for its disagreement with its Review Board, but it failed also to

take cognizance of Appellant's exceptions respecting rulings of the Hearing Examiner at hearing.

It is impossible to determine by examining the Commission's Memorandum Opinion and Order [R. 730-731] whether the Commission intended to uphold the Hearing Examiner in this regard or whether it agreed with its Review Board (which granted in substance Appellant's Exceptions) [R. 656], but nevertheless held such errors to be of no decisional significance. It is impossible because the Commission totally ignores such exceptions. Such rulings and Appellant's exceptions thereto should have been considered by the Commission and failure to do so is reversible error [Administrative Procedure Act, 5 U.S.C. §557].

The rulings of the Hearing Examiner to which Appellant refers are clearly set forth in the Review Board's decision disqualifying Intervenor. First, the Hearing Examiner refused to permit Appellant to cross-examine Miss Tucker to determine whether or not certain sketches of the proposed tower submitted to Miss Tucker were at variance with that which Intervenor proposed in its application, despite the fact that, in an offer of proof the Appellant indicated that if such cross-examination was permitted Appellant was prepared to show a variance between the sketches and that proposed in Intervenor's Application [R. 652, including footnote 6]. Obviously this was relevant and should have been placed on the record for how could the Examiner conclude that there was reasonable assurance that Intervenor could construct that which it proposed unless the record contained a description of the tower proposed and evidence of whether such was the same as proposed in Intervenor's application? The foreclosure from such an investigation has resulted in the fact that the record is still unclear as to the actual construction which Intervenor contemplates [R. 653, footnote 6 cont'd]. Second, Appellant attempted to cross-examine Miss Tucker respecting the impossibility of getting a permit to extend the height of the existing tower atop the Continental Building, but the Hearing Examiner prohibited this inquiry [R. 653]. This too was a relevant inquiry, for if

it could be established that the Intervenor's proposal could not be constructed, for any reason, then its proposed site indeed was unavailable. Finally, Appellant was precluded from questioning Miss Tucker as to whether present lessees which have antenna facilities already on the roof under their leases can object to Intervenor's proposed construction, but here again, the Examiner sustained objections to this line of questioning, despite the fact that the so-called "lease-option agreement" specifically provided that the future lease to be drawn "shall not abridge prior rights of other lessees " [R. 431].

For all the above reasons, or any of them, it must be concluded that the Hearing Examiner erred as a matter of law in restricting legitimate cross-examination by Appellant; that the Commission erred in its Memorandum Opinion and Order by not at least directing itself to Appellant's Exceptions in this regard; and that upon remand these matters must be considered by the Commission.

To summarize, this case must be reversed and remanded to the Commission in view of three major errors of law respecting disposition of the site issue, which directly bears upon the ultimate conclusion of which proposal, Appellant's or Intervenor's, will better serve the public interest. First, the Commission failed to state the basis for its decision that Intervenor had met their burden of proof as to site availability, and failed also, to state the basis for reversing its Review Board's detailed, well reasoned, decision in this regard. Therefore, it has made impossible intelligent review by this Court, for this Court cannot determine why or on what basis the Commission concluded as it did. Second, the record evidence on the whole does not support the Commission's ultimate conclusion, and the only rational conclusion that can be drawn from an examination of all record evidence is the conclusion reached by the Commission's Review Board, and that is, that the Intervenor must be disqualified for failure to carry its burden to establish reasonable assurance that its site is available for the use it proposes, i.e., to construct

a 116 foot tower upon which to mount its antenna. And, third, that the Commission erred in prohibiting Appellant from eliciting vital and legitimate testimony bearing upon the site availability issue and in not directing itself to Appellant's exceptions to the Hearing Examiner's rulings in this regard.

The Comparative Issue

Introduction

Since the applications of Appellant and Intervenor are mutually exclusive, and only one can be granted, the Commission specified the following issue in this proceeding to determine which, on a comparative basis, would better serve the public interest [R. 509]:

"To determine on a comparative basis, which proposals would best serve the public interest, convenience and necessity in light of the evidence adduced [respecting a comparison of the proposed service areas] and the record made with respect to the significant difference between the applicants as to:

"a) the background and experience of each having a bearing on the applicant's ability to own and operate the FM station as proposed

"b) proposals of each of the applicants with respect to the management and operation of the FM broadcast station as proposed

"c) the programming service proposed in each of the above-captioned applications."

Under this comparative issue, the Commission's Hearing Examiner concluded that Appellant's proposal was superior and recommended a grant of Appellant's application [R. 508-534]. The Commission's Review Board reversed [R. 732-747] and the Commission affirmed its Review Board, without opinion [R. 784].

In weighing the record evidence, the Hearing Examiner's ultimate conclusion was based upon preferences awarded Appellant in maximum diversification of control of mass media of communications; integration of ownership and management; superior coverage; program planning; proposed programming; and local residence. He held such to outweigh the preferences awarded Intervenor for broadcast experience and planning with respect to the equipment proposed by Intervenor [R. 528-534].

In choosing Intervenor's application, on a comparative basis, the Commission's Review Board (and the full Commission, since it denied Appellant's Application for Review without opinion), citing the Commission's *Policy Statement on Comparative Broadcast Hearings*, 5 Pike & Fischer RR 2d 1901 (1965); indicated that it was concerned, on a comparative basis with two primary objectives: maximum diversification of the media of mass communications and the best practicable service to the public. It preferred Appellant in the first category since it has no interest in any media of mass communications, while Intervenor (at that time) had an interest in one other broadcast station. Respecting best practicable service to the public, the Commission preferred Appellant for its more efficient use of the frequency, while it preferred Intervenor for their proposed integration of ownership and management. It concluded that no preferences were warranted for program planning, proposed programs, or the past broadcast record of the station in which Intervenor has an interest. Its ultimate conclusion was that Intervenor's preference on integration of ownership and management outweighed, not only the more efficient use of the frequency by Appellant, but outweighed also, the preference given Appellant for maximum diversification of ownership of mass media.

In arriving at its comparative decision, the Commission failed to comply with the standards set forth by this Court in *Johnson Broadcasting Company v. FCC*, 85 U.S. App. D.C. 40, 175 F. 2d 351 (1949), failed to follow the guidelines it set forth in its above-referenced Policy

Statement on Comparative Broadcast Hearings, and failed to consider properly its Hearing Examiner's decision especially with respect to Appellant's proposed integration of ownership and management. In particular, the Commission erred as a matter of law in: 1) Picking and choosing evidence to support its conclusions, rather than considering all evidence, pro and con, with respect to both applicants; 2) Reaching ultimate facts which were not rational inferences from proper findings of basic fact; and 3) Reaching an ultimate conclusion without due regard to the decision of its Hearing Examiner, contrary to the guidelines set forth in its above-referenced Policy Statement, and, inconsistent with Commission and Court precedent.

IV.

IN COMPARING THE QUALIFICATIONS OF APPELLANT
AND INTERVENORS THE COMMISSION PICKED AND
CHOSE EVIDENCE RATHER THAN CONSIDERING ALL
EVIDENCE, PRO AND CON, FOR EACH APPLICANT

A. The Background and Experience of Mr. Lansman and His Proposed Participation in Intervenors' Proposed Station

At paragraphs 5 and 15 of its decision [R. 734-739], the Commission finds that Mr. Lansman will be the general manager and chief engineer of Intervenors' proposed station; that he will devote 100% of his time to the operation of the proposed station; that he resided in St. Louis until he was 15 years old, and will reside there in the future; and that he has had "extensive", "substantial" and "diverse" broadcast experience, both with respect to technical and non-technical positions at the station in which the Intervenor has an interest (KRAB, Seattle, Washington) and at several other stations. This summation not only stretches to the breaking point all evidence favorable to the background, experience and proposed integration of Mr. Lansman, but it ignores, completely, adverse

evidence of decisional significance. The record establishes the following undisputed facts which should have been considered but which were not considered by the Commission respecting Mr. Lansman. First, the Commission is silent as to Mr. Lansman's age. At the time of hearing Mr. Lansman was twenty-two years old [R. 512]. He has never been employed at St. Louis (TR. 138); he has not been, and is not now, a member of any St. Louis civic, social or fraternal organization [TR. 91]. Since leaving St. Louis at age fifteen, Mr. Lansman's return visits to St. Louis were to visit with his father, but his father no longer lives in St. Louis but now resides in California [TR. 88]. Although Mr. Lansman proposes to move to St. Louis to manage the station, if granted, he has made no plans for residence there and testifies that he might well live at the station [TR. 100-101].

Respecting Mr. Lansman's broadcast experience, the record reflects the following: Mr. Lansman's combined employment at radio stations KHOE and KHAI (referred to by the Review Board) was less than one year [TR. 140-144]. His first period of employment at Station KRAB dated from February 1962 to September 1963 [TR. 145]. Some of this time was in preparation for the commencement of station operation, for the station did not commence operation until December 1962 [R. 179]. From September 1963 until September 1964 Mr. Lansman traveled to San Francisco, St. Louis (for the purpose of attempting to raise funds to file for an application in his own name), and Jacksonville, Florida [TR. 145-148]. He returned to KRAB in the latter part of February 1964 and stayed until about July 1965, when he went to New York City on vacation, for he was "completely tired from working at KRAB" [TR. 148-149]. Accordingly, rather than "extensive", "substantial" and "diverse" broadcast experience as found by the Commission, Mr. Lansman's total broadcast experience is a little more than two years duration. Moreover at Station KRAB Mr. Lansman considered himself a "semi-volunteer" and he received no regular salary [TR. 90]. He did not consider his work to

be "employment" [TR. 132]. Although the Milam-Lansman partnership is an equal partnership, Mr. Milam is putting up all of the investment in the proposed St. Louis station and Mr. Lansman has no financial investment at stake [TR. 244]. Mr. Lansman proposes to be general manager of the station, a proposed commercial station, but he admits that he has had no sales experience [TR. 121]. Mr. Lansman was not born in St. Louis but Los Angeles, California, and sometime in his early childhood, moved to St. Louis to reside with his father [R. 511-512].

Since most of Mr. Lansman's meager broadcast experience has been at Station KRAB, it was error for the Commission not to consider, in evaluating Mr. Lansman's experience, the following evidence of record respecting the nature of that station. The station employs only two paid staff members [TR. 218]. Although assigned in the commercial broadcast band, it broadcasts no commercial spot announcements and the only non-commercial spot announcements broadcast are requests for volunteers to help the station in its programming and to purchase its program guide, the sole source of its revenue [TR. 235-236; 249-250]. Its studios are housed in a converted doughnut shop [TR. 218]. It has no news broadcast — local, regional, national or international [TR. 234-235]. It has no wire service [TR. 218]. It is a "part-time" station, with no afternoon programming and whose three hours' morning programming is merely "repeats" of previous evening programming [TR. 235-236].

In *Johnson Broadcasting Company v. Federal Communications Commission, supra*, this Court set down as one of the essentials for a legally valid decision of the Federal Communications Commission in comparative cases the following:

"A final conclusion must be upon a composite consideration of the findings as to the several differences [in the proposals], pro and con each applicant."

As set forth above, in evaluating the qualifications of Mr. Lansman, respecting his proposed position at the station, his proposed residence in

St. Louis, and what the Commission refers to as his "extensive broadcast experience", the Commission failed to consider the adverse findings set forth, *supra*. Had the Commission done so it would have had to conclude that Mr. Lansman is ill-equipped to become the general manager of a broadcast station in a large urban community at the early stage in his career; that his proposed future residence at St. Louis, for any appreciable duration, is questionable in view of his sporadic past employment; the fact that he no longer has any ties in the community, and the fact that he has made no firm plans for residence there. Again, had the Commission directed itself not merely to the dates but the duration and type of experience which Mr. Lansman has had and the fact that some of it was as a "teenager", it could hardly have referred to such as "extensive", "substantial" and "diverse" broadcast experience. Therefore, had the Commission considered the above adverse findings which it had a clear obligation to do [*Johnson Broadcasting Co. v. FCC, supra*], obviously it would have accorded far less weight to the proposed integration of ownership and management of Intervenors and less weight to its broadcast experience, also. Since its preference to Intervenors in these categories was dependent upon Mr. Lansman and was critical to its decision [R. 743], the case must be reversed and remanded for reconsideration by the Commission of these adverse findings. [*Sunbeam Television Corp. v. FCC*, 100 U.S. App. D.C. 82, 243 F.2d 26 (1957)].

B. The Proposed Integration of Ownership and Management of Appellant

The three principals of Appellant will be the general manager, station manager and program director. The Examiner concluded, rationally, that Appellant will have "complete integration of ownership and management" [R. 534]. As General Manager, it shall be the responsibility of Joseph Autenrieth to set the overall programming policies of the station, to supervise the station's operation, to co-ordinate sales efforts, to budget funds for the station, approve or disapprove purchases of a major

nature, determine rate structures, establish compensation for employees, and otherwise to establish policies for the overall operation of the station [R. 352]. Eugene Maxey, as Station Manager, will be directly responsible to Autenrieth, and will coordinate the functioning of the various departments of the station [*Ibid*]. Ralph Hebblethwaite, as Program Director, will be responsible for scheduling shifts for announcers, implementing programming schedules, determining sequence of musical selection and otherwise supervising the programming of the station [*Ibid*].

As to time availability to perform these functions, the Commission ignored record evidence that Autenrieth is obliged to spend only two hours per day, on an average, to perform his duties at the Church and School [TR. 388], and he testified that beyond these two hours he is prepared to devote his time to the operation of the station. Moreover, in addition to their assigned duties, all three plan to announce on the station [TR. 341-342; 408-409]. Certainly, the Commission never has and does not now expect that a meaningful integration proposal requires an applicant to devote every waking hour directly to the affairs of the station. It expects rather substantial daily participation by owners and it is this that Appellant proposes.

V.

THE COMMISSION'S ULTIMATE FINDINGS OF FACT ARE NOT RATIONAL INFERENCES OF PROPER FINDINGS OF BASIC FACT

The important categories of comparison in which the Commission committed error in making ultimate findings not supported by basic findings were: integration of ownership and management; program planning; and the past broadcast record of Intervenors.

A. Integration of Ownership and Management

In reaching the ultimate finding that Intervenor is to be preferred over Appellant in the category of integration of ownership and management the Commission, at paragraph 15 of its decision [R. 738], relies upon the following basic facts: " . . . although Milam is awarded no appreciable credit in this category Lansman makes a near optimum showing in view of his intention to devote his full time in a position of day to day management responsibility, coupled with his substantial and diverse broadcast experience. When there is added the fact that he has lived in St. Louis in the past and that he will move to the city in the future the showing is enhanced." At paragraph 18 of its decision the Commission, relying upon Lansman's qualifications, ultimately finds that such a showing "far outweighs the part time participation of Appellant's local residents."

Such ultimate findings simply cannot be squared with this record. The Commission ignores the youth of Mr. Lansman; the fact that he has had no sales experience, whatever; no managerial experience; has had only sporadic jobs at broadcast stations and his experience at Station KRAB was not even considered by him to be "employment" since, among other things, he received no regular salary; the fact that Mr. Lansman was not born in St. Louis, but moved there at some point in his childhood and departed at the age of 15, not to return except for visits with his father. Respective his proposed future residence, the Commission ignored the fact that Mr. Lansman no longer has ties in St. Louis; that he has not made plans for residence there; and that his past history of sporadic employment does not give reasonable assurance of continued future residence, especially since he has no financial investment at stake in the operation of the proposed station. Moreover, and although the Commission concedes that Milam, an equal partner in Intervenor, is to be given no appreciable credit under this category, it appears nevertheless to ignore that correct ultimate finding and equate Intervenor with Mr. Landsman. Even if Mr. Landsman made a perfect showing, which of course he

has not, the ultimate finding would have to be that Intervenor is at most 50% integrated.

The Commission errs also in reaching its ultimate finding concerning the integration proposal of Appellant.

At paragraph 16 it finds ultimately that all of Appellant's principals will participate in the operation of the proposed station and "devote as much time as is necessary and that all three are St. Louis residents of long duration." At paragraph 17 it finds that such participation is entitled to little weight and is only slightly enhanced due to the longtime local residence of its principals. However in reaching this ultimate finding, the Commission ignores realities as well as record evidence.

The Commission's ultimate finding that Appellant's proposed participation will be merely "part time" is not supported by the facts. In effect it treats Appellant's integration proposal as if Appellant's three principals worked regularly in a community outside St. Louis and would merely come by the station from time to time. The basic facts are that they will be at the station at all times, will perform the top management functions at the station and even announce on the station. Their duties at the Church and School do not detract from their operation at the station. As Board Member Pincock stated in his dissent, "[Appellant] has ministered to the spiritual needs of a St. Louis congregation for twenty years . . . their close ties to the community and their extensive experience in church and administration and related public service activities, in my opinion, offer greater assurance that the proposed station would be operated in the public interest than can be expected from Intervenor." [R. 747].

The basic facts lead to the ultimate finding that Appellant is to be preferred over Intervenor, for while Appellant is 100% integrated, Intervenor is only 50% integrated; that Appellant's principals demonstrate familiarity with area needs and desires, in view of their background and long time residence in St. Louis; that Intervenor's principals are

strangers to St. Louis — Milam never having lived there and Lansman having departed at age 15; and that Appellant, therefore, gives greater assurance than Intervenors that the proposed station will be operated in the public interest.

B. Program Planning

At paragraph 19 of its decision [R. 739], the Commission finds that Appellant made programming contacts both before and after it filed its application. It found that although Mr. Lansman visited St. Louis in 1961 and 1963, the evidence is barren of any contacts made during those visits. At paragraph 20 of its decision [R. 740], the Commission ultimately finds neither applicant is entitled to a preference respecting program planning. In effect the Commission finds that despite the fact that Intervenors' principals have not resided in St. Louis, and therefore have not demonstrated area familiarity by local residence, there was no need for programming contacts prior to the formation of their proposed programming schedule. Not only is this an irrational conclusion, but it is contrary to the Commission's Policy Statement on Comparative Broadcast Hearings, *supra*. In that Policy Statement (at page 1911) the Commission indicates that an applicant has the responsibility for a reasonable knowledge of the community and area based on surveys or background which will show that the programs proposed are designed to meet the needs and interests of the public in the area, and that failure to make contacts, even where an applicant is familiar with the area, results in a "serious deficiency." Both by reason and by Policy, then, the ultimate fact must be reached that Intervenor receives a serious deficiency for its lack of programming contacts prior to the filing of its application.

C. The Past Broadcast Record of Intervenor

At paragraph 23 of its decision [R. 741-742], the Commission finds ultimately that the record evidence gives no basis for concluding that the

past broadcast record of Station KRAB (in which Intervenorshave an interest) is a poor one. It does so without setting forth any findings, whatever, with respect to the operation of that station. For this reason alone, the case must be reversed and remanded [*Retail Store Employees Union v. NLRB, supra; Burlington Truck Line, Inc. v. U.S., supra; Universal Camera Corporation v. NLRB, supra*]. Additionally however, the record evidence in fact shows the poor broadcast record of Station KRAB. As noted heretofore, in a different context, the station operates only part time; employs only two paid staff members; although assigned in the commercial broadcast band, broadcasts no commercial spot announcements; broadcasts no news programs — local, regional, national or international; has no wire service; etc. This station makes poor use of scarce frequencies. What additional evidence does the Commission need to reach the ultimate findings that the station, indeed, is not only an extremely unusual one, but one that has compiled a record which can only be characterized as "poor". This is the station at which Mr. Lansman has acquired most of his broadcast experience. Is it not a reasonable inference that the proposed St. Louis station would exhibit the same characteristics as Station KRAB? At the very least, the Commission erred in concluding that the operation of that station was not "poor" without explaining the evidence upon which it relies to make such a finding.

Considering only, therefore, the fact that the Commission reached ultimate findings in this proceeding with respect to the comparative elements of integration of Ownership and Management of both Appellant and Intervenorshave and the Program Planning and Past Broadcast Record of Intervenorshave, which were not based on proper basic findings of fact, this case must be reversed and remanded to the Review Board [*Johnson Broadcasting v. FCC, supra*].

VI.

THE COMMISSION'S ULTIMATE DECISION ON THE
COMPARATIVE ISSUE IS CONTRARY TO THE
COMMISSION'S STATED POLICIES RESPECTING
COMPARATIVE HEARINGS AND CONTRARY TO
COURT AND COMMISSION PRECEDENT

The Commission's "Policy Statement on Comparative Broadcast Hearings" sets forth guidelines to be followed in evaluating, on a comparative basis, mutually exclusive proposals such as present herein.

In that Policy Statement, 5 Pike & Fischer RR 2d 1901, 1908, the Commission states:

"We believe there are two primary objectives towards which the process of comparison should be directed. They are, first the best practicable service to the public, and, second a maximum diffusion of control of media of mass communications."

Respecting the diversification factor, the Commission makes clear that it is concerned not only with other media located in the area to be served but other media interests generally within the United States [*Ibid*, pages 1908-1909].

Respecting the category of best practicable service to the public, the Commission looks to the participation proposed in the operation of the station by the applicants, the proposed program service (and planning), past broadcast records, the efficient use of the frequency, and other miscellaneous matters not at issue here [*Ibid*, 1909-1913]. Concerning the participation in station operation by owners, the Commission notes that it is inherently desirable that legal responsibility and day-to-day performance be closely associated and that in addition there is a likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve those needs, to the extent the station's proprietors actively participate in the day-to-day operation of the station. The Commission goes on to say that it is primarily interested in fulltime participation and that any person who will not devote to the station substantial

amounts of time on daily basis will be given no comparative credit. Additionally, the Commission in assessing the proposals indicates that it will also look to the positions which participating owners will occupy and will accord particular weight to staff positions held by the owners, such as general manager, station manager, program director and the like. To be considered in examining the attributes of participating owners, the Commission indicates that it shall be interested also in their experience and local residence. As between the two, the Commission indicates broadcast experience is not as significant as local residence for the latter gives greater likelihood of continuing knowledge of changing local interests and needs. It notes that future local residence will be accorded less weight than present residence of several years duration. Respecting proposed program service the Commission makes two points: first, that it will assess a serious deficiency against any applicant, whether or not familiar with an area, that does not make a survey or otherwise obtain reasonable knowledge of the community or area to be served prior to formulating a program proposal; and second, that decisional significance will be accorded only to material and substantial differences between applicants' proposed programming plans, citing *Johnson Broadcasting Co. v. FCC, supra*. It notes that it will consider the efficient use of frequency in comparative cases where for one or more engineering reasons one proposal will be more efficient than the other. Directing itself to the question of past broadcast record, the Commission indicates that it is not concerned with average performance, but will give consideration to a past broadcast record which is either usually good or unusually poor. [*Ibid*, pages 1909-1913].

In its Policy Statement, *supra*, at page 1914, the Commission emphasizes that its statement is not intended to stullify the continuing process of reviewing its judgment in comparative cases and that it proposes to remain flexible and open-minded. It notes, further, that it is adopting no new criteria but rather restricting certain areas of comparison relied upon in the past in comparative hearings.

An examination of the comparative qualifications of Appellant and Intervenor under the above-referenced guidelines, and Commission and Court cases respecting comparative proceedings, requires the rational conclusion that a grant of Appellant's application will provide for maximum diversification of control of mass media of communications and will better serve the public.

A. Diversification of Control of Mass Media of Communications

As found and concluded by the Commission's Review Board at paragraph 11 of its decision [R. 735], whereas Intervenor, at the time of hearing had ownership interest in one broadcast outlet, Station KRAB, Seattle, Washington, Appellant had no interest in any broadcast station or any other media of mass communications. It, therefore, awarded Appellant a preference in this important area of comparison. Subsequent to the hearing, the licensee of Station KRAB, Jack Straw Memorial Foundation, acquired an additional broadcast outlet, a non-commercial station.

The Commission's conclusion that Appellant should be awarded only a "very slight" preference due to the distance of KRAB from St. Louis, fails to consider that Seattle and St. Louis are major markets and as the Commission indicated in its Policy Statement, *supra*, it is interested in *maximum* diffusion of control of mass media. Therefore the preference to Appellant in this very important category is both clear and strong. Also, it is further enhanced in view of Intervenor's present ownership interest in two broadcast outlets.

B. Best Practicable Service to the Public

1. Participation in Station Operation by Owners

In examining the proposed participation in station operation by Appellant and Intervenor, the Commission's Review Board looks to form rather than substance and ignores the aims of meaningful integration of

ownership and management clearly stated in the Commission's Policy Statement, i.e., "it is inherently desirable that legal responsibility and day-to-day performance be closely associated . . . [and] there is a likelihood of greater sensitivity to an area changing needs and programming designed to serve these needs to the extent that the station's proprietors actively participate in the day-to-day operation of the station." The Commission's Review Board loses sight of these clear objectives when it relies for its entire decision upon the Commission's statement in that same category that the Commission is concerned with fulltime participation, and as the time spent moves away from fulltime, the credit will drop sharply.

It is obvious that the term "fulltime" is used to distinguish a proposal where the owners will absent themselves from the station and engage in the operation of the station only on a part-time, non-daily basis. Certainly no one would argue that the Commission expects an owner to spend every waking moment physically at the broadcast studio. For example, in this proceeding, Appellant's proposed hours of operation are 6 A.M. to 12 Midnight, daily. No one reasonably could conclude that the Commission would expect all three principals of Appellant to sit in the control room at the station during this entire period. What is expected, however, in order to obtain a strong showing for integration of ownership and management is that the owners of the station assume responsibility in the day-to-day operation of the station. The Commission has made this clear in numerous cases [*Historyland Radio*, 28 F.C.C. 69, 17 Pike & Fischer RR 1129 (1960); *Grand Broadcasting Company*, 36 F.C.C. 925, 2 Pike & Fischer RR 2d 327 (1964); *Radio Wisconsin, Inc.*, ___ F.C.C. ___, 10 Pike & Fischer RR 1224 (1956)]. In *Grand*, *supra*, at page 339, the Commission stressed that day-to-day participation in the operation of the station was desirable and like the Commission's Policy Statement, *supra*, emphasized that it is interested in positions such as general manager, station manager and program director. Also,

in *Veteran's Broadcasting Company, Inc.*, 38 F.C.C. 25, 4 Pike & Fischer RR 2d 375, 417 (1965), a case cited by the Commission at paragraph 17 of its decision [R. 740], the applicant ultimately preferred proposed to hire a general manager, but the evidence reflected that past activities of the principals of the favored applicant, and the length of their association together, lent assurance that they would not be content with spectators roles in the station's affairs but would maintain a firm grip on the operational reins of the station. The showing here made by Appellant is far superior since Autenrieth will be the general manager, and the assistant manager to be hired will be responsible to Autenrieth. Indeed even when an applicant proposes occasional absences on a regular basis, from the community in which the proposed station is to be located, the Commission nevertheless has held sufficient day-to-day operational responsibilities are present for a meaningful integration showing. For example, in *Sarkes Tarzian, Inc.*, 27 F.C.C. 635, 17 Pike & Fischer RR 905 (1959), a preference was awarded an applicant who proposed to devote thirty hours per week to the station, where the evidence of record showed that despite the fact that he would be required to absent himself from the city from time to time. Again, in *Farragut Television Corp.*, 8 F.C.C. 2d 279, 10 Pike & Fischer RR 2d 50 (1967), a preference was given a corporate applicant where one of its principals would be engaged in the day-to-day supervision of the operation of the proposed television station even though he had similar responsibilities at an AM and FM station in the same community.

Appellant makes a much stronger showing than the preferred applicants in the cases cited above. At hearing, and as set forth herein, all three principals of Appellant have assigned duties at the station — requiring their substantial participation in the operation of the station on a daily basis. As in the *Sarkes Tarizian, Inc.*, *supra*, there is no evidence of record which would even imply that all three will not have sufficient time to perform such duties. Finally, their other duties actually

compliment the operation of the radio station, since they administer to the spiritual and educational needs of the community they propose to serve. Indeed their association with the church and school enhances their showing as to best practicable service to the public and, indeed, the dissenting member of the Commission's Review Board so found [R.747].

On the other hand, Intervenor's make only a minimal showing under this element of comparison. Mr. Milam, a 50% partner, and the one who has provided the entire investment in Intervenor's St. Louis proposal, will not devote any time on a day-to-day basis at the station. Accordingly, in line with the Commission's above-referenced Policy Statement and in its decisions before and after the adoption of that Policy Statement, Mr. Milam is entitled to no credit insofar as integration and ownership is concerned.

Mr. Lansman, the other 50% partner of Intervenor's, does propose full time participation in the operation of the station. It is he, then, to whom the Commission shall look for the legal responsibility of the station's operation and it is he to whom the Commission will look to determine whether there is a likelihood of greater sensitivity to an area's changing needs and programming designed to serve those needs. As set forth in Parts IV and V of this Argument, *supra*, Mr. Lansman simply does not have the maturity or background to assume this responsibility and it would be a gamble for the Commission to place reliance on Mr. Lansman for sensitivity of the area's changing needs and programming designed to serve those needs. He is a stranger to St. Louis, prepared the proposed programming schedule of Intervenor without any programming contacts, and his only experience has been gained at Station KRAB (without a set salary), a non-commercial station operating part time and not broadcasting balanced programming, having no local, national or international news. Lacking, therefore, knowledge of St. Louis, sales experience, managerial experience, and experience in the operation of a commercial station, it is unrealistic to conclude that he, rather than

Appellant's three principals, would have greater sensitivity to the changing needs of St. Louis residents. Appellant's principals have spent most of their lives in St. Louis, have administered to the spiritual and educational needs of St. Louis residents, have built lives in St. Louis and offer assurance that they shall stay there for an indefinite period. They will head all major departments of the station, and participate in the station's operation on a daily basis. Who then, Appellant or Intervenor, gives the best assurance of serving the needs and interests of St. Louis' residents? Merely to ask the question is to answer it. There is simply no substantial evidence on the record as a whole to support the Commission's conclusions that Intervenor's Lansman gives greater likelihood of sensitivity to St. Louis' needs than do Appellant's three principals.

2. Proposed Service Areas

Throughout its decision, and apparently in an attempt to justify its ultimate result, the Commission "plays down" evidence of record pointing to a grant to Appellant. While conceding that Appellant will serve almost 50,000 more persons than will Intervenor, the Commission notes "only about 23,000" presently receive less than three FM services. The Hearing Examiner did not "write off" these persons who will continue to receive only two FM broadcast services if Appellant's application is not granted. Correctly, the Examiner concluded that Appellant was entitled to a "substantial preference" in this regard [R. 528-529]. Correctly, the Commission concludes that Appellant will provide a third FM broadcast primary service to more than 23,000 persons than would Intervenor. It fails to cite its own cases that there is a presumptive need for such underserved areas [*WNOW, Inc.*, 37 F.C.C. 961, 3 Pike and Fischer RR 2d 875, 881 (1964)]. The best case the Review Board finds to diminish the preference is *Armin J. Whittenburg, Jr.*, 30 F.C.C. 417, 19 Pike & Fischer RR 755 (1961). The case simply is not in point. In *Whittenburg*, all areas to be served received no less than *eleven* other FM broadcast services.

3. Planning

In its Policy Statement, *supra*, it is set forth by the Commission, clearly, and unequivocally, that a serious deficiency results when an applicant does not fulfill his responsibility for obtaining knowledge of the community and area he intends to serve, based either on surveys or background, prior to submitting its program proposal. As stated, *supra*, Intervenor do not do so, and therefore the Commission erred in not finding such a deficiency in Intervenor's proposal [*Policy Statement supra*, at page 1911].

4. Past Broadcast Record

Since Mr. Milam has been responsible for the operation of Station KRAB and since Mr. Lansman has acquired most of his broadcast experience at that station, it is important that the record be examined not only as a past broadcast record, *per se* but as evidence of what the Commission might expect of Intervenor in the operation of the proposed St. Louis station. As the Commission held in *Farragut Television Corporation, supra*, at page 56:

"A record of past performance provides an indication of the quality of the performance which may be expected from a broadcaster in the future, and we emphasize the importance of this comparative criteria in the Policy Statement."

At paragraph 23 of its decision [R. 741-742], the Commission concludes that the record of KRAB is not a poor one, and thus awards no preference for past broadcast record, for by implication it found that it was not an unusually good one, either. It is unclear why the Commission reached that conclusion, for it failed, completely, to recite any of the record evidence (which is substantial) respecting the operation of that station. Both Appellant and Intervenor throughout this proceeding have pressed for conclusion in this regard — Intervenor arguing that Station KRAB is exceptionally good and Appellant arguing that Station KRAB is

exceptionally bad. Both filed Exceptions to the Hearing Examiner's Initial Decision in this regard (the Examiner, also, making no conclusions in this category) [R. 508-534]. As set forth at Parts IV and V of this argument, *supra*, many of the aspects of the operation of that station, at least, are poor. In the absence of countervailing meritorious programming which perhaps the Commission might find, the Commission's conclusion that the operation is not poor cannot be sustained. The case should be remanded for additional findings and conclusions by the Commission in this category.

5. Proposed Programming

The issues designated in this proceeding specifically inquired into the proposed programming of Appellant and Intervenor [R. 509]. Appellant and Intervenor each offered substantial evidence respecting proposed programming. Each made findings of fact and conclusions of law and each filed Exceptions to the Hearing Examiner's Initial Decision with respect thereto. The Hearing Examiner found that Appellant was entitled to preference in this category [R. 531]. At paragraph 21 of its Decision [R. 741], the Review Board found:

"The program proposals of the Applicants are markedly different."

It held, however, that under the Policy Statement, *supra*, program differences can be considered only to the extent that they go beyond ordinary differences in judgment and show a superior devotion to public service. Then, without specific findings as to the proposed programs of either Appellant or Intervenor, it concludes that neither has established such superior devotion to the public service. This Court is entitled to a greater explanation than that. In *Johnson Broadcasting Co. v. FCC*, *supra*, this Court held that one of the essentials in comparative decisions was that:

"Findings must be made in respect to every difference, except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective."

Certainly, the proposed programming is neither frivolous nor wholly unsubstantial. It was in issue in this case. Moreover, both parties have advanced, throughout this proceeding, that its proposed programming is superior to the other and the Review Board so found [R. 739-740]. Additionally, and at the very least, the Commission cannot conclude that neither proposal shows a superior devotion to the public service without at least setting forth basic findings and conclusions in support of that conclusion so that this Court may review such to determine whether the Commission's conclusion is reasonable. And this is especially true where the Hearing Examiner has made extensive findings and conclusions and has awarded a preference in the category [*Retail Store Employees Union v. NLRB, supra; Oil, Chemical and Atomic Workers International Union v. NLRB, supra; Lorain Journal Company v. FCC, supra; Burlington Truck Line v. U.S., supra; Universal Camera Corporation v. NLRB, supra*].

Conclusion Respecting Comparative Issue

To summarize, respecting the Commission's decision on the comparative qualifications of Appellant and Intervenor, the Commission committed reversible error in: 1) picking and choosing evidence upon which to base its conclusion, rather than considering all evidence pro and con with respect to both applicants, and especially with respect to the Commission's failure to consider adverse findings with respect to the background, broadcast experience and proposed integration of Mr. Lansman, and the complete integration of ownership and management proposed by Appellant; 2) by reaching ultimate findings of fact which were not rational inferences of proper findings of basic facts, respecting integration

of ownership and management of Appellant and Intervenors, and the lack of program planning and the poor broadcast record of Intervenors; and 3) in reaching an ultimate decision contrary to the guidelines in the Commission's Policy Statement on Broadcast Hearings, realistically viewed, and, contrary to Court and Commission precedents in such comparative hearings.

CONCLUSION

In view of errors in law respecting the Commission's decisions on both the question of site availability and on the comparative qualifications of Appellant and Intervenors, Appellant respectfully prays this Court to reverse and set aside such orders of the Federal Communications Commission and remand the case to the Commission and for such other relief as this Court deems just.

Respectfully submitted,

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BRIEF FOR INTERVENOR

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 21,123

FILED DEC 22 1967

CHRISTIAN FUNDAMENTAL CHURCH,

Nathan J. Paulson
CLERK
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee,

LORENZO W. MILAM & JEREMY D.
LANSMAN, A PARTNERSHIP,

Intervenors.

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(i)

QUESTIONS PRESENTED

The questions set forth by Appellant are those agreed to by the parties pursuant to a prehearing stipulation. Intervenorors emphasize that they do not necessarily agree with any factual or legal premise implicit in those issues.

(iii)

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CHRISTIAN FUNDAMENTAL CHURCH,

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Appellee,

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LANSMAN, A PARTNERSHIP,

Intervenors.

BRIEF FOR INTERVENOR

COUNTERSTATEMENT OF THE CASE

Intervenors accept the counterstatement of the case of Appellee, Federal Communications Commission, and adopt said statement as if it were fully set forth herein.

SUMMARY OF ARGUMENT

A. THE SITE AVAILABILITY ISSUE

The Commission correctly decided the issue as to the availability of Intervenor's antenna site. This issue was one of minor significance, but Appellant continues to argue the point out of all proportion to its significance, and Appellant's continued disputation appears frivolous, particularly since Appellant proposed *exactly the same site for its own antenna*. The issue called for the production of evidence as to reasonable assurance that Intervenor had this site available to them for an FM transmitting antenna in St. Louis. It did not extend to the technical suitability of the site — only its availability was in issue. Intervenor produced their lease option on the site and affirmative testimony in their behalf by the authorized representative of the owner of the site — an office building in St. Louis which is the site of other FM stations. Appellant failed to rebut this firm evidence of the availability of the site. After pleading that a site availability issue was required, Appellant offered no witnesses or evidence as to the matter. The Commission correctly decided, therefore, that the site is available to Intervenor. *Suburban Broadcasting Company, Inc.*, 19 Pike & Fischer RR 956(a) (1960); *Queen City Broadcasting Company*, 21 Pike & Fischer RR 472(b) (1961). In any event, any question as to the availability of the site to Intervenor has been resolved; on October 25, 1967 they signed a lease for the use of the site.

B. THE COMPARATIVE ISSUE

Appellant's argument on the comparative issue is that the Commission did not properly weigh the evidence, and that the inferences drawn by the Commission from the record are erroneous. This is the

import of Appellant's statement that the Commission "picked and chose" evidence to support its decision. A reading of the decision on the comparative issue reveals that it complied with all of the requirements of administrative law and procedure. There was adequate explanation of the Commission's consideration of the substantial evidence in the entire record and of how such consideration led to the decision reached. Thus, rather than "picking and choosing", the Commission weighed the evidence before it, and reached a conclusion adverse to Appellant.

With respect to the criteria of comparison, there was ample evidence to support the Commission's award of a substantial preference to Intervenor because of the greater degree of integration of ownership and management which it will devote to the proposed station. Of Intervenor's two equal partners, one would devote full time to the operation of the St. Louis station, and the other would devote 25% of his time to this station's affairs. Each of Intervenor's partners has more broadcast experience than all of Appellant's principals combined. Of Appellant's three principals, all have full time occupations as ministers of the Christian Fundamental Church, in addition to teaching in and administering the church school system, and none has indicated any intention to give up such activities.

Appellant gained slight preferences in two areas of comparison, coverage and diversification of media interests. These preferences were not of decisional significance. Comparing respective service areas, Appellant's proposal would bring the third FM service to a *de minimis* number of additional persons. Intervenor's proposal would add the third service to a smaller number of persons. In the area of diversification of control of mass media, both parties were found to stand alike, with the exception that Intervenor is associated with a

noncommercial public service station in Seattle, Washington, some 1,700 miles distant from St. Louis. On this basis, Appellant was awarded a "very slight" preference.

In the comparative areas where no preference was awarded to either party, any error committed was in favor of Appellant, for Intervenor clearly showed superiority in these categories (*i.e.*, proposed programming and past broadcast record).

Therefore, based on the complete record, the Commission's decision was correct and should be affirmed.

ARGUMENT

I. THE SITE AVAILABILITY ISSUE

A. The Commission Decision Reversing Its Review Board On The Site Availability Issue Was Correct In All Respects.

The Commission's decision reversing the Review Board's disqualification of Intervenor for failure to meet their burden under the site availability issue was legally and factually sufficient and proper.

Intervenors submitted a lease-option agreement [R 431], with the owners of the building on which the antenna would be located. Miss Thelma Tucker, the building manager and rental agent who signed the document on behalf of the owners of the building, testified both as to her authority to sign such agreements and the availability of the Continental Building roof as an antenna site to Intervenor [R 553-613].¹

¹ There was no question as to Miss Tucker's veracity, nor could there have been, for the Review Board had earlier accepted her unsworn statement as the basis for adding the site availability issue. Appellant had obtained and offered such statement [R 169].

In an unbroken line of Commission precedents, it has been held that a site availability issue contemplates a determination that there is reasonable assurance that the site would be available for an applicant's proposed use. The cases make clear that the term reasonable assurance [such as an option] is not synonymous with certainty [in the form of a deed or lease], and the proof required does not have to take into consideration every hypothetical situation that may or may not arise in the future.

The cases are typified by *Queen City Broadcasting Company*, 21 Pike & Fischer RR 472(b)(1961). In the *Queen City* case the Commission denied a petition to dismiss an application where the petition alleged that the applicant no longer possessed a definite transmitter site as required by the Commission's Rules. In the alternative, it was requested that the Commission postpone further proceedings in regard to the application until an action to evict the applicant from its proposed transmitter site, that was concomitantly pending before the District Court in Texas, was completed. An action had been instituted in the courts of the State of Texas by the owner of the proposed transmitter site to obtain possession of said site. The applicant's possession of the site had been based upon a lease with a prior owner and the new owner brought suit to determine whether the applicant's continued possession under the lease was lawful. The rights of the parties to the action turned upon the proper interpretation of certain clauses in the lease. In denying the petition to dismiss, the Commission refused to postpone the proceedings pending the outcome of the trial, holding that "it is not a foregone conclusion that Queen City is not entitled to possession. Under the circumstances, and since Queen City remains in possession of the site, the petitioner's request will be denied."

Unlike the situation in *Queen City* in the instant case there was no doubt relative to the availability of Intervenor's proposed site. It is an uncontroverted fact that Intervenor propose the same site that Appellant does. Intervenor introduced into evidence a lease option agreement which gave the requisite assurance that the site would be available to Intervenor.

Appellant seeks to confuse "reasonable assurance of site availability" with "technical suitability" of such a site. Availability and suitability, however, are separate and distinct concepts. (*Edina Corporation*, 24 Pike & Fischer RR 455 (1962)). The difference between the two was elucidated by Review Board Member Nelson [R 659 fn 6]:

"If there is a question whether an applicant can build a radio tower on his specified site (either for lack of possession or authority such as zoning), that is a question of *availability*. If the specified site is available, i.e., owned or leased or otherwise legally 'occupied' by the applicant and properly zoned, but there is a question whether the particular antenna can be constructed on the site, that is a question of *suitability*."

When this issue was added to the hearing by the Review Board, it stated:

"The Board's opinion, in this regard, does not mean that a binding arrangement is needed to demonstrate site availability . . . Commission requirements are satisfied when an applicant proposes a site with reasonable assurance and good faith that the site will be available for the intended purpose."
[R 423]

That there was no question raised as to suitability of the site for the use proposed is clear from the Review Board's language in the same paragraph:

"The Board's disposition of the Bureau's motion does not, however, comprehend a determination of the suitability of the proposed antenna site and the Board notes the absence of any factual allegations concerning such a question." [R 423]

Thus, there was no question as to whether the proposed antenna could, in fact, be constructed on that site, but rather whether Inter-venors had the site available to them for the use. Appellant continues to argue an issue that was not litigated, and it seeks to have this Court determine that the Commission's Memorandum Opinion and Order correcting the Review Board's error is erroneous for failing to rule on an issue that was not before it.

Thus viewed, the Commission's Memorandum Opinion and Order does nothing more than correct a legal error on the part of the Review Board. The basic facts necessary to support the Commission's decision are to be found in its Memorandum Opinion and Order. The Opinion states:

"3. The site availability issue was added at the request of the Broadcast Bureau to determine whether there is a 'reasonable assurance' that the antenna site proposed by M & L will be available for its use. To meet its burden on this issue M & L introduced into evidence a lease option agreement between it and the owners of the building on which it proposed to locate its antenna. This document was signed by Miss Thelma N. Tucker, the building rental agent, on behalf of the owners of the building after receipt of sketches from M & L disclosing their construction plans. Miss Tucker testified at the hearing concerning her authority to sign lease option agreements on behalf of the owners and about the availability of the building rooftop as an antenna site.

"4. The Commission has repeatedly held that absolute assurance of site availability is not required, but only that there be a showing of reasonable

assurance of site availability made in good faith. *Beacon Broadcasting System, Inc.*, 21 RR 727(1961), *Suburban Broadcasting Company, Inc.*, 19 RR 956(a)-959 (1960), *Brennan Broadcasting Company*, 15 RR 12e (1957) and *B. J. Parrish*, 14 RR 480-483 (1956)." [R 731]

The Commission relied on longstanding precedent in deciding that Intervenor had met their burden, while the Review Board departed from this precedent without giving any reasons for such radical departure. The Commission had no choice but to reverse the Review Board and remand the case for further consideration on the comparative issues which were not reached when the case was first considered by the Review Board.

In sum, Appellant seeks to hold Intervenor to a higher degree of proof than was required both by the issue and by longstanding Commission precedent. It is contended that evidence should have been offered on a matter not in issue. This result is sought on the basis of mere speculation and supposition rather than hard facts. The record is clear and uncomplicated. Intervenor had a lease option agreement which was uncontroverted as to its binding nature. The evidence was sufficient to meet the required test. The wisdom of the Commission policy respecting the degree of proof required for meeting the burden under a site availability issue was borne out in the instant case by events occurring subsequent to final Commission action. Pursuant to the terms of the lease-option agreement, Intervenor, on October 25, 1967, entered into a binding lease with the owners of the Continental Building for the use of that building's roof for an antenna site.

Finally, we are constrained to comment that Appellant has sought to develop the so-called "site issue" into one of high significance. Analysis reveals, however, that the emphasis placed upon this "issue" is out

of all proportion to its importance as a factor in the decision granting Intervenors' application and denying that of Appellant. In order to gain the proper perspective it must be pointed out that the decision in this case was made on the basis of the comparative issues, while the determination of the site issue extended merely to a conclusion that Intervenors had shown that there was reasonable assurance that the antenna site specified in Intervenors' application would be available for the use proposed. Both the evidence presented at the hearing and events subsequent thereto clearly prove the availability of the site in question. The absurdity of continuing to argue this point is evident by calling attention to the fact that not only is the site the very same one proposed by the Appellant for the location of its antenna, i.e., the roof of the Continental Building in St. Louis, but that Intervenors now have a binding lease for use of the site.

II. THE COMPARATIVE ISSUE

Introduction

The two mutually exclusive applications of Appellant and Intervenors were set for hearing on the following comparative issues:

"1. To determine the area and population within each of the proposed 1 mv/m contours and the availability of other FM services (at least 1 mv/m) to such areas and populations.

"2. To determine, on a comparative basis, which of the proposals would better serve the public interest, convenience, and necessity in light of the evidence adduced pursuant to the foregoing issue and the record made with respect to the significant difference between applicants as to:

- "(a) The background and experience of each having a bearing on the applicant's ability to own and operate the FM station as proposed.
- "(b) Proposals of each of the applicants with respect to the management and operation of the FM broadcast station as proposed.
- "(c) The programming services proposed in each of the above-captioned applications.

"3. To determine in light of the evidence adduced pursuant to the foregoing issues which of the applications should be granted."

In granting Intervenor's application, the Commission's Review Board evaluated the evidence pursuant to the comparative criteria set forth in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 Pike & Fischer RR 2d 1901 (1965). This statement by the full Commission defines and limits the areas of relevant comparative consideration and directs its Review Board to decide cases before it under the policies therein set forth. The Board in the instant case restated the factors of decisional significance as expressed in the Policy Statement:

"...there are two primary objectives toward which the process of comparison should be directed. They are first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications." [R 735]

With respect to the best practicable service, the Review Board emphasized the significance of Intervenor's greater degree of integration of ownership and management, and declared this factor to be so significant in determining the best practicable service as to override Appellant's small superiority in coverage [R 742]. With respect to diversification or diffusion of control of mass media, the Review Board

determined that Intervenors' other broadcast interest — in Seattle, Washington — did not threaten an undue concentration of control of mass media. Again, Intervenors' preference for best practicable service to the public overcame Appellant's slight preference on the diversification factor [R 742]. The Commission correctly affirmed.

Appellant has failed to show any error in the Commission's decision.

**A. The Evidence Supports The Commission's
Decision That Intervenors Warranted A
Substantial Preference In The Category Of
Integration Of Ownership And Management**

Despite Appellant's attempts at obfuscation it is clear that Jeremy Lansman, a full partner in Intervenors, will devote his full time to the operation of Intervenors' station [R 187]. His youth [he is in his mid-twenties] cannot operate to disqualify him from being a full time general manager for the proposed station, for in viewing the evidence, one is struck by the inescapable fact that Mr. Lansman has more broadcast experience [8 years] than Revs. Autenrieth, Hebblethwaite and Maxey combined. The decision clearly relates the fact that Mr. Lansman will be the full time General Manager and Chief Engineer of Intervenors' station. The evidence shows that he is qualified to serve in these capacities, having devoted his time and energies to radio since the age of fifteen [R 184-187].

In contrast, the record clearly shows that Appellant's principals cannot and will not devote full time to the operation of their proposed station. All three principals have full time ministerial and teaching callings, and numerous other activities and they have made no proposal to curtail any presently conducted activities. Yet, these men propose

to devote "as much time as is necessary" to the operation of the station. The Commission has repeatedly held that such a promise is not a conclusive indication that there will be full time participation.

(*Veterans Broadcasting Company, Inc.*, 38 FCC 25, 50, 4 Pike & Fischer RR 2d 375, 407 (1965); *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965)). As stated in *Charles Vanda*, 8 Pike & Fischer RR 2d 427 (1966):

"... under the policy statement, no credit can be awarded for local residence and/or past broadcast experience where the person with such residence or experience will not be involved in the operation of the station; and to the degree that the proposed participation is less than full time, the value of the residence or experience is diminished."

Appellant's own action during the course of the hearing betrayed its inability and unwillingness to have the three ministers devote their full time to station activities. After the hearing commenced, Appellant stated its intention to employ an "experienced broadcaster" as a full time assistant general manager to handle the day-to-day operation of the Appellant's station. Such a position was not provided for in Appellant's initial application.

Thus, it is inconceivable that these three men have enough time in an admittedly busy day to devote their "full time" to each of two diverse lines of endeavor. As men of the cloth, the demands on their time are even more severe for they must minister to the needs of their congregation seven days a week. Moreover, they have full time teaching and administrative activities in the church's elementary and high schools. The mere assumption of titles such as General Manager, Station Manager, and Program Director does not meet the test of integration of ownership with management, for it is not the mere title but the

duties, responsibilities, experience and actual time to be devoted to the station operation that is of decisional significance. Here the Commission correctly decided that a substantial preference would be granted to Intervenor since Mr. Lansman will have as his only vocation the management and operation of the St. Louis station, and Mr. Milam will devote one-quarter of his time to the St. Louis station.

**B. Appellant's Slight Preferences For Diversification
Of Media And Proposed Service Areas Were Not
Of Decisional Significance.**

Appellant was conceded slight preferences in the areas of diversification and coverage, but there is no basis for attributing any decisional significance thereto. On the contrary, the differences between the parties are so insignificant as to be useless in basing a decision on which party will best serve the public interest.

1. Diversification of Media

Appellant gained a "very slight preference" because it has no interests in broadcast stations, while Intervenor is linked to station KRAB-FM in Seattle. The preference is meaningless, however, because (a) KRAB is some 1,752 miles from St. Louis, so there is no local or sectional control of broadcast media, which is the most significant area of concern (*L. B. Wilson, Inc.*, 3 Pike & Fischer RR 2d 61); (b) KRAB's operation is educational in nature as well as noncommercial and is not conducted so as to adversely affect competition among commercial stations (*Integrated Communications Systems, Inc.*, 3 Pike & Fischer RR 2d 557); and (c) KRAB's operation conduces to widespread public expression, not the contraction of opportunity which the diversification

policy seeks to avoid. As the Commission has stated, "Our diversification policy is intended to insure that the listening and viewing public will receive information from diverse and independent sources." (*Grand Broadcasting Co.*, 3 Pike & Fischer RR 2d 779, 789).

2. Proposed Service Areas

The Commission determined that Appellant was entitled only to a slight preference for the small number of additional listeners to which it would extend the third FM service. It was found that Appellant's proposal would provide additional FM service to approximately 47,000 people out of more than two million persons who would be served by either of the parties (a difference of 2%). Only some 23,000 of these persons presently receive less than three FM services (1.1% of the total population to be served).

The Review Board concluded that this small difference was of no decisional significance because the area in which the Church would add a signal is well served now; the "2% population gain" would be in a different State, located more than 30 miles from St. Louis, and has at least two services now. No need for the new St. Louis signal in this area was shown [R 737].

The Review Board cited *Armin H. Wittenberg, Jr.*, 19 Pike & Fischer RR 755, as one precedent supporting its conclusion that comparative coverage should not be decisive here. In that case a 4.1% coverage advantage was held not to be decisive. The Church argues that *Wittenberg* is not comparable to this case because the "4.1% population gain" received more services than would the Church's "2% population gain."

The Review Board correctly applied the law: a minimal difference in coverage has only a minimal comparative effect and number of available services to the area of difference is of minor consequence. In fact, the number of other services is generally of no consequence. In *WBUD, Inc.*, 23 Pike & Fischer RR 135, the Commission *denied* an application which would have brought the first and only FM service to 32,066 persons in a "white area", and it granted a competing applicant which proposed no white area coverage.

Surely, since a proposal to serve a small white area in *WBUD* was not decisive, the Church's proposal to add a third service cannot be held to be controlling here. (*The Young Peoples Church of the Air, Inc.*, 2 Pike & Fischer RR 2d 527, 538).

It is established Commission policy that the nature of the service sought is to be taken into consideration when determining who utilizes the frequency to the best advantage [*Policy Statement, supra*, at 398]. Both Appellant and Intervenor are seeking a Class-B FM station in St. Louis. A Class-B FM station is primarily designed to serve the metropolitan area of large cities (Section 73.206(b) of FCC Rules). This purpose will be fully served by Intervenor [R 736].

C. In The Comparative Areas Where No Preference Was Awarded, Any Error Committed Was In Favor Of Appellant, For Intervenor Clearly Showed Superiority In These Categories.

1. Proposed Programming

A comparison of the various program proposals shows that Intervenor would provide a far superior program service to meet the needs of all the citizens of St. Louis than would Appellant. Intervenor propose

a diversified format of wide variety and a "free forum" type operation which will appeal to a broad audience. In contrast, Appellant proposes a private outlet for its religious organization which would be nothing more than a private adjunct for its various religious activities.

The Appellant's station will be known as the Full Gospel Voice [Tr. 389]. It will carry every Sunday the one-hour sermon of Appellant's pastor, Dr. Joseph Autenrieth, and his Church's evening service; it will carry every day his Temperance Crusade; it will carry every week-day morning his Church's School Chapel Hour; at least 20.5% of its time will be devoted to religious programs, and on cross-examination Reverend Autenrieth admitted that other seemingly non-religious programs will also spread his gospel message ("Tots to Teens", seven days a week, is an example: it was at first listed as educational, but on cross-examination it developed that it will be directed to people of evangelical persuasion) [Tr. 333, 334] [R 340-350]; the persons interviewed by Appellant are predominantly religious leaders, ministers, Christian Fundamental Church members, or Dr. Autenrieth's friends; half of them have heard him speak from the pulpit. In short, Appellant proposed primarily a religious station, serving the Christian Fundamental Church's aims, and such aims are inconsistent with the service of a broad range of listeners.

As an example of the Church's service philosophy, Reverend Autenrieth testified that his Church will not engage in racial discrimination in its radio service, but the record shows that in practice this will not be effectuated. Until a few days prior to the hearing, the Church publicly advertised that its schools were racially segregated [Tr. 345, 346]. The Church and its schools always have been completely devoid of integration. This announced policy was abandoned in November 1964,

a few days before the hearing, but *de facto* segregation in the Church and its personnel and the school and its personnel continued [Tr. 389]. This seems to explain why the Church's policy, as expressed by the pastor, Dr. Autenrieth, would be antagonistic to the operation of the proposed station in accordance with its obligations under the Fairness Doctrine.

The Church would not carry certain programs on racial matters unless the Rules required [Tr. 343]. And, as another example, in the event Dr. Martin Luther King requested the use of the proposed facilities of the Christian Fundamental Church's station to request solicitation of funds to support activities of CORE in the State of Mississippi, Rev. Autenrieth said he would permit an occasional request of this nature to be granted but there would be no regularly scheduled program [Tr. 356, 357].

The matter of human relations in racial activity, therefore, assumes "political" character, in the Appellant's view, even if presented by a minister of a church. This reflects an unspoken, but real, policy of hostility which continues the Appellant's long "recently terminated" policy of racial discrimination in its schools. By contrast, Intervenor's concept of the duty of a broadcast station was stated by Mr. Milam:

"A radio station should have a general overall balance in programming to get, for instance, extreme views, middle of the road views, religious and non-religious views. Everything should balance out." [Tr. 277]

Such a viewpoint is not shared by Appellant. It is clear that the Commission's Fairness Doctrine would wither from non-use at any radio station operated by Appellant. For example, Rev. Autenrieth,

who would be the General Manager of Appellant's station, had been broadcasting for nearly a decade a program called the Temperance Crusade. His viewpoint is a part of the Christian Fundamental Church philosophy [Tr. 360]. The program would have been a daily feature on Appellant's station [R 340-350].

When asked what programs would be regularly scheduled to present opposing viewpoints on subjects discussed in the Temperance Crusade Program, Rev. Autenrieth responded by stating:

"I have never had anybody ask any station for time in rebuttal to my statements, for the simple reason I do not enter into the area of argumentation in the temperance crusade." [Tr. 357]

The colloquy on this point [Tr. 357-361] illumines the fact that Rev. Autenrieth would never seek out opposing views on the subject because his firm belief prevented him from accepting any opposition to that belief.

The only inference to be drawn is that Appellant would not consider as controversial any idea that it would advocate.

The record, therefore, clearly shows that if the Commission erred in not granting a preference for proposed programming, it erred in favor of Appellant. Intervenor would provide a far superior service in the context of high quality, unbiased, broad appeal programming.

2. The Broadcast Record of Station KRAB

Appellant attempts to argue that Station KRAB (with which Intervenor is associated) has a "poor" broadcast record. Since the Commission correctly concluded that there was no evidence to support such an assertion, Appellant reaches for support in such contrived assertions as, KRAB has its studios in a converted doughnut shop (Appellant's Brief, p. 32), KRAB broadcasts no commercial announcements, the station operates only part-time and it employs only two paid staff members (Appellant's Brief, p. 38). It is a novel proposition, indeed, that because a radio station's studios are in a converted doughnut shop and does not solicit commercial advertisements, it has a "poor" record. What Appellant neglects to mention is that KRAB is a listener-supported station owned and operated by a non-profit organization, and its purpose is to counter the stereotyped programming of genre radio with high quality unique offerings.

The evidence as to KRAB's programming shows great detail as to the fully noncommercial, public service character of its operations. A few highlights from the record are set out herein.

In its 1964 composite week, KRAB carried 8.9% educational, 10.7% discussion, and 29.4% talk programs. And 40.6% of its programs were live [R 249]. In the two-week period of September 14-27, 1964, KRAB carried these programs, among others:

Commentary	Mississippi Report
Children's Program	Music for Yom Kippur
Political Talks	Poetry Program
Music of Dufay	Divorce & Trial Run Marriage
Film Review	Music of Bach
The Theatre & Its Double	Music of Indian, Jazz
Music of Mozart	Cantatas of Bach
James Baldwin	Soviet Press & Periodicals
Readings of Periodicals	A Country Doctor By Kafka
Jean Shepard Monologue	Two Works by Edgar Varese
Music of Schoenberg	Economic Growth of India
Music - Jazz	Music of Frescobaldi
Film Review	A Country Doctor
Baroque Music	Archie & Mehitabel
The Rise and Fall	Ethnic Music of Spain
Music of Schubert	What is a Boss
Music of Russia	The Indian Queen
Catholicism Reconsidered	The Philosophy of Ayn Rand
1066 & All That	The Turn of the Screw
The History of Music	The Shaw Terry Letters
Philosophy East & West	Rexroth Book Review
Music of Boccherini	Sunday Concert
Music of Purcell	Music from the Italian Broad-
Music for Orchestra	casting System
The Great Advocate	Reading from the New Statesman
Antigone in Greek	Music of Korea
Antigone: The Opera	Live Panel: Outdoor Advertising
Music of Canada	Economic Growth: Latin America
Reading from Jessica Mitford	Music for Looking Back
Three Bach Motets	Friday Evening Concert
Infra Red	The Great Ladies Sing
Piano Music of Prokofiev	The Soul & Telepathy
African Periodicals	Kenneth Rexroth Books
Dixieland Music	The Psychology of Accident Sickness
Reading from Ebony	Alan Rich History of Music
Music of Josquin	Music of Arter
Interview: Politics in the	Music of Stamitz
Middle East	Sunday Afternoon Concert

[R 250-254].

A somewhat similar type of programming will be available to the residents of St. Louis as a result of the Commission's decision. Here again, any error was in favor of Appellant for, far from having a poor record, KRAB has made an outstanding contribution to broadcasting.

III. THE COMMISSION'S DECISIONS ARE CONSISTENT WITH
COURT AND COMMISSION PRECEDENT AND POLICY.

As has been demonstrated, the decisions complained of were based on substantial evidence, and they contained the relevant facts necessary to support the decision reached. They are in harmony with the requisites imposed by administrative law, the Commission having complied with all relevant statutory, regulatory and judicial principles.

A. The Commission Decision Reversing The
Review Board On The Site Availability Issue.

The issue before the Commission the first time it took up this case was only whether the Review Board (in its *first* consideration of the case) erred in holding that Intervenor's did not meet their burden under the site availability issue as framed. [The Board, of course, reversed itself the second time it took up the case, and the Commission affirmed.] The facts relied upon both by the Review Board and the Commission were the same. Application of those facts to Commission precedent and policy differed. The Review Board, the first time, misapplied the standards required for a showing under a *site suitability* issue to the narrow *site availability* issue that was before it. In contrast, both the well reasoned dissent of Board Member Nelson and the lucid Commission decision placed the issue in its proper perspective.

The full Commission corrected this misapplication of the facts to the law. It found that the evidence submitted on the issue (and set forth in its decision) met the requisite test. With respect to determination of this issue, the Commission has consistently held that "we do not require an applicant to enter into a final binding arrangement in order to establish that a site is available to him." *Suburban Broadcasting Company*, 19 Pike & Fischer RR 956(a), 959.

As stated above (pp. 4-9), Appellant has not advanced any evidence that the site selected was unavailable to Intervenor, either in the hearing, during the internal Commission appellate proceedings, or in its brief before this Court. Appellant's arguments have been negative in nature, in that their main thrust consists of contentions that Intervenor had not gone far enough in their proof. No direct evidence countering Intervenor's showing of reasonable assurance of site availability was put forth. With a lack of specific conflicting evidence, the Commission did not have before it, to the usual degree, the task of weighing and assessing conflicting evidence in order to draw inferences so as to reach its conclusion. (See *Radio Officers Union CTU v. NLRB*, 347 U.S. 17, 48, 98 L.Ed. 455, 481.)

Furthermore, Appellant's approach is fatally defective when viewed under the positive mandate which it faced to bring forth evidence showing that a proposed site is not available. The issue was added in this case not because there was specific evidence showing that use of the site was foreclosed to Intervenor, but only because the Review Board believed that it did not have reasonable assurance that the "management of the Continental Building" would permit Intervenor to use the proposed antenna site [R 422, 423]. The degree of proof required to show such assurance was met by the evidence set forth in the Commission's opinion, for even though a burden was placed upon Intervenor to show reasonable assurance, that burden is not nearly as awesome as Appellant contends. As stated in *Greater New Castle Broadcasting Corp.*, 8 Pike & Fischer RR 291, 319:

"...in the absence of evidence appearing upon a hearing record that a site . . . is not available . . . it must be necessarily presumed that the site specified will be available . . ."

Thus, in complying with the mandate of the added issue, Intervenor provided more evidence than would be called for in the normal course of events in similar hearings. Appellant produced no rebuttal testimony or exhibits. As a result, the Commission's Broadcast Bureau (which had petitioned originally for the addition of this issue) [R 441], the Hearing Examiner [R 528], one Member of the Review Board [R 657-661], and the full Commission [R 730-731] all concluded that Intervenor had reasonable assurance that the antenna site it proposed is available to it.

**B. The Review Board's Decision Granting
Intervenors' Application On The Basis
Of Superior Comparative Showing**

The decision set forth the facts which the Commission reasonably required to make its decision. Proper reference was made to the Commission's *Policy Statement on Comparative Broadcast Hearings* (1 FCC 2d 393, 5 Pike & Fischer RR 2d 1901 (1965)), which sets forth the basis upon which the Review Board makes its comparative decisions. Appellant does no more than quibble with the weight attached to the evidence by the Review Board and would have this Court do likewise. Appellant clearly calls for this Court to substitute its judgment for that of the Commission, in order to overturn a decision unfavorable to it. It is well established that a court will not substitute its judgment for that of the agency on matters as to the weight of the evidence where the relevant factors have received proper consideration and there is sufficient support in the record. (*Pinellas Broadcasting Co. v. Federal Communications Commission*, 97 U.S. App. D.C. 236, 230 F.2d 204, cert. denied, 350 U.S. 1007 (1956); *Witmer v. U.S.*, 348 U.S. 375, 99 L. Ed. 428; *New York v. United States*, 331 U.S. 284, 91 L. Ed. 1492).

Analysis of Appellant's arguments reveals that the prime quarrel is that the Commission did not accept Appellant's version of the inferences to be drawn. There is no showing that the decision was based upon anything less than substantial evidence. Thus, Appellant's arguments are insufficient since the standard of judicial review set by the Administrative Procedure Act requires that findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. (*FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 99 L. Ed. 1147.)

In the absence of a showing that the Commission erred in any manner this appeal must fail.

CONCLUSION

For the foregoing reasons, the Decision below should be affirmed.

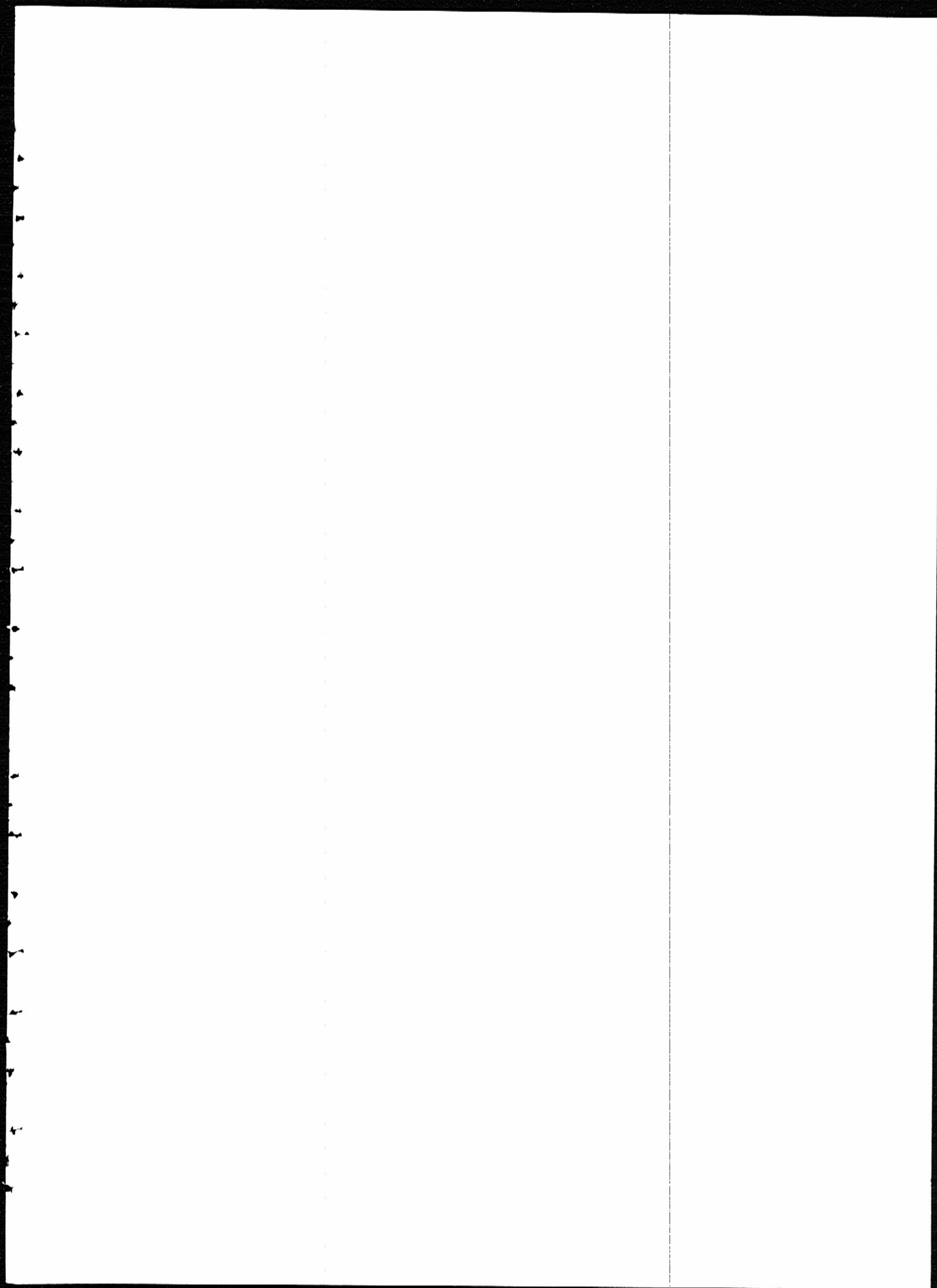
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BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 21,123

CHRISTIAN FUNDAMENTAL CHURCH,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

LORENZO W. MILAM AND JEREMY D.
LANSMAN, A PARTNERSHIP,
Intervenor.

ON APPEAL FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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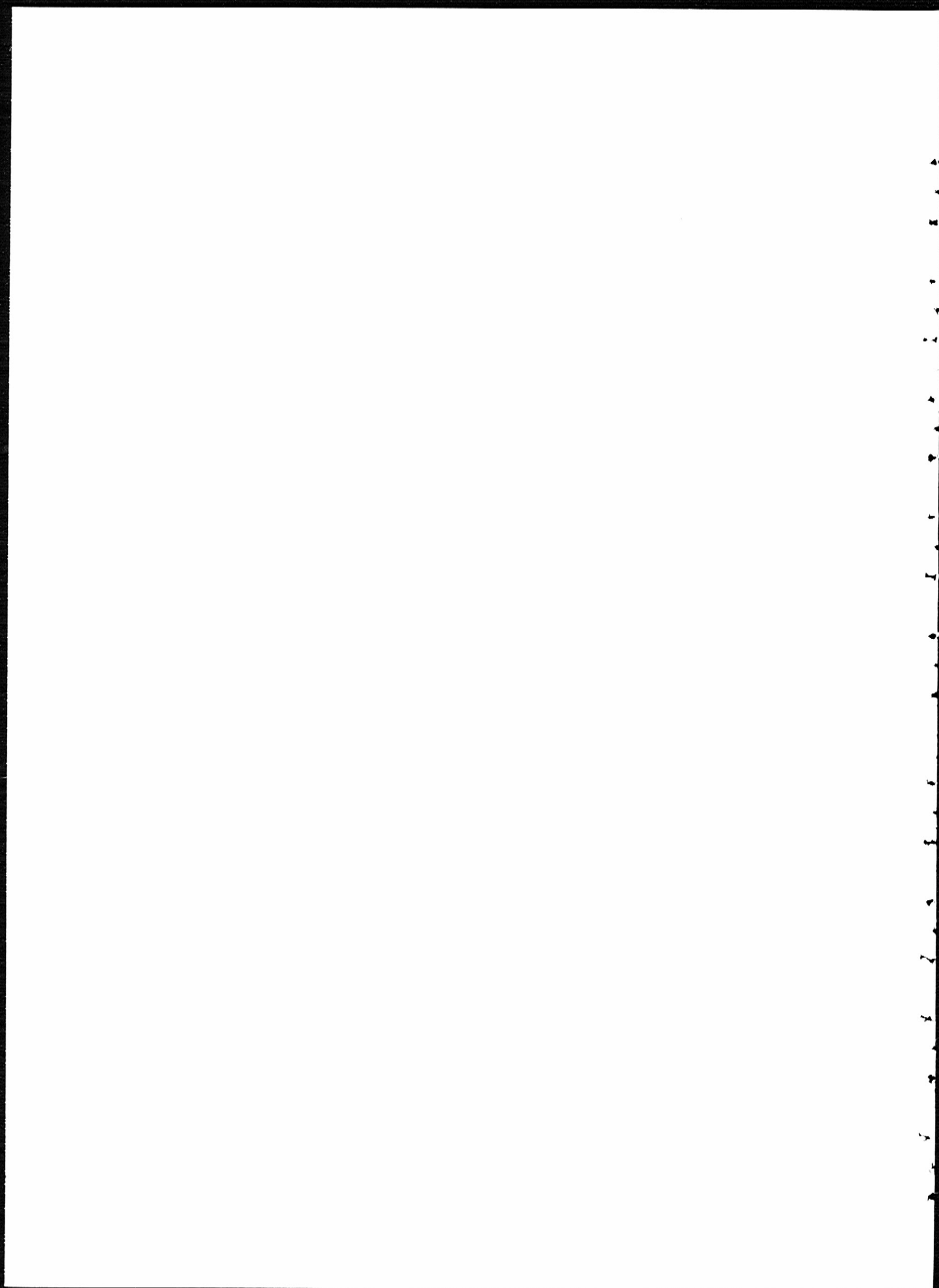
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STATEMENT OF QUESTIONS PRESENTED

The questions presented are correctly set forth on the first page of appellant's brief.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal filed by Christian Fundamental Church, appellant, whose application for a new FM radio station in St. Louis, Missouri, was denied by the Federal Communications Commission. Jurisdiction is conferred on this Court by 47 U.S.C. §402(b)(1). The appeal is from (1) a decision by the Commission's Review Board which, following a comparative hearing, concluded that a grant of intervenor's application would better serve the St. Louis public than would a grant of appellant's application for the same community (R. 732-747), (2) a Commission order refusing to review the Board's decision on the comparative issue (R. 784), and (3) an

earlier Commission Memorandum Opinion and Order reversing the Board's conclusion that intervenor had not sustained its burden of proof on the site-availability issue (R. 730-731).

The Comparative Decision

Appellant Christian Fundamental Church, is a non-profit religious and educational organization located in St. Louis. It ministers to some 1000 persons per week; operates three Church schools (elementary, junior, and senior high) and conducts evening high school and college level classes. It also compiles, edits and distributes two religious publications. Three ministers, Reverend Antenrieth, Hebblethwaite, and Maxey, are engaged in these activities. They also propose to devote as much time as is necessary to appellant's proposed radio station, and to retain an experienced broadcaster as general manager (R. 734-735).

Intervenor, Lorenzo W. Milam and Jeremy D. Lansman, is a partnership which proposes to establish a new FM station on the same frequency in St. Louis for which appellant has applied. Both Milam and Lansman have been affiliated with Station KRAB, a non-commercial, listener supported, FM station in Seattle. Milam plans to devote 25% of his time and Lansman will devote full time to the daily operation of their proposed station (R. 733).

In his Initial Decision the presiding examiner recommended that appellant's application be preferred on a comparative basis (R. 508-534).

While adopting most of the examiner's findings and some of his conclusions, the Review Board did not agree with his recommenda-

tion (R. 733). It concluded first that appellant was only entitled to a very slight preference on the diversification criterion because ^{1/} Milam inter alia retains only a 1/7 trusteeship interest in KRAB; KRAB is located 1,700 miles from St. Louis; and there are many broadcast outlets in St. Louis (R. 733).

Appellant was also awarded a preference for greater coverage. This factor was, however, deemed minor because both proposed stations would serve more than 2 million persons and all of the St. Louis urbanized area, thus carrying out the objective of the particular FM facilities for which they had applied. ^{2/} The additional persons who would be served by appellant are located some 30 miles away in a different state in an area which is not socially or economically connected with St. Louis (R. 736-737).

Other aspects of the comparative case were considered under the heading "best practicable service." At the outset, the Board observed that the Commission's Policy Statement on Comparative Broadcast Hearings stresses that credit will be given only for full-time integration of ownership and management in broadcast operations (R. 737).

Lansman, one of intervenor's owners, the Board found, "will devote full-time to the day-to-day operation of the station in the

^{1/} Milam is one of the seven members of the Board of Trustees which administers KRAB, licensed to the Jack Straw Memorial Foundation, a non-profit educational corporation (R. 735).

^{2/} The Class B FM facilities in question are designed "to render service to a sizeable community, city or town, or to the principal city or cities of an urbanized area, and to the surrounding area." 47 CFR 73.206(b) (1967 Supp.).

capacity of general manager and chief engineer; he will also reside in St. Louis, the city in which he was raised." His broadcast experience "has included technical and non-technical positions at Station KRAB and several other stations" (R. 738). No appreciable credit was awarded for Milan's participation since he only intended to devote 25% of his time to the proposed station.

Appellant's ministers propose "to devote as much time as is necessary" to the proposed station "while continuing to perform their present functions at the church and school." Aside from the college broadcast experience of one minister, and another minister's preparation and presentation of a program called "Temperance Crusade," appellant's principals have had no broadcast experience (R. 738). Even before its Policy Statement, the Commission awarded little credit to part time participation by the owners in the operation of a radio station. Intervenor was therefore found to be substantially superior because:

Taken alone, Lansman's full-time integration, as enhanced by past broadcast experience and past and future local residence, qualitatively far outweighs the part-time participation of all CFC's [appellant] local residents. . . . Moreover, in view of the present full-time church and school activities of the three CFC principals . . . and the absence of any indication these activities could or would be curtailed, it would have to be concluded that a serious doubt exists as to the amount of time which Autenrieth, Maxey, and Hebblethwaite could effectively devote to the day-to-day operation of the station, regardless of their sincere intentions. (R. 739)

Other comparative aspects including program planning (R. 739-740), program proposals (R. 740-741) and past broadcast record (R. 741-742) were considered and not found to be determinative. On balance, a majority of the Board concluded that a grant of intervenor's application would better serve the public in St. Louis (R. 742). Board Member Pincock dissented, stating that while he found no fault with the facts found by the examiner and the Board, in his judgment, appellant's application offered "greater assurance that the proposed station would be operated in the public interest" (R. 747). Review was denied by the full Commission (R. 784) so that the Board's decision on the comparative issue has the same effect as a Commission decision.^{3/}

Site-Availability Decision

At the request of the Broadcast Bureau a site availability issue had been added to the proceeding to ascertain whether intervenor had reasonable assurance that its proposed antenna site was available for use. After the hearing, this issue was resolved in intervenor's favor by the examiner as the Bureau had recommended. He based his decision on a lease-option agreement signed by the rental agent of the owner of the proposed antenna site; her testimony regarding her authority to enter into such agreements; and her representation that

^{3/} 47 U.S.C. §155(d)(3) provides that a decision of the Board, unless reviewed by the Commission, "shall have the same force and effect" as a Commission decision.

she had worked for the owners for 15 to 18 years and had been given a wide latitude in the performance of her duties (R. 527-528).

The Board reversed holding that intervenor had not sustained its burden of proof. In sum, a majority of the Board concluded that neither the lease-option agreement nor the rental agent's testimony was enough to demonstrate that intervenor had "reasonable assurance in good faith" as to the availability of its proposed antenna site (R. 649-656). Board Member Nelson dissented, taking the position that the Board had imposed a burden of proof never before required under the issue, and had "overlooked a long line of Commission precedents" (R. 657).

Review was sought before the full Commission by intervenor (R. 669-693). Commenting on this request, the Bureau adhered to its position that the issue should have been resolved in favor of intervenor essentially for the reasons given in the Initial Decision. All that is required under the site issue is reasonable assurance, the Bureau noted; final binding arrangements are not required. The Board therefore erred in requiring more. Nevertheless, the Bureau opposed review for policy reasons (R. 698-701).

A unanimous Commission reversed the Board's conclusion on the site issue. After summarizing the evidence on which the examiner had based his decision (R. 730-1), it concluded:

The Commission has repeatedly held that absolute assurance of site availability is not required but only that there be a showing of reasonable assurance of site availability made in good faith. Beacon Broadcasting System, Inc., 21 RR 727, 728 (1961); Suburban

Broadcasting Co., Inc., 19 RR 956(a), 959 (1960);
Brennan Broadcasting Company, 15 RR 12e (1957); and
B. J. Parrish, 14 RR 480, 483 (1956). We have care-
fully examined the record evidence in this case and
are of the view that M&L has demonstrated reasonable
assurance that the antenna site proposed by it is
available for its use. We conclude, therefore, that
M&L has met its burden of proof on this issue. The
decision of the Board majority to the contrary is
reversed (R. 73i).

The Board subsequently resolved the comparative issue
against appellant (supra, pp. 2-5). When the Commission refused
review, this appeal followed.

SUMMARY OF THE ARGUMENT

After a comparative hearing on the mutually exclusive applications of appellant and intervenor, the Commission's Review Board granted intervenor's application. The Board adopted many of the Hearing Examiner's basic findings, but reached a different conclusion as a result of its evaluation of the traditional comparative factors. In essence, the Board found that intervenor's owners would dedicate more time to the operation of their proposed station than would appellant's principals because of the latter's many and demanding church related activities. Intervenor was also found to possess superior broadcast experience.

The Board's decision is supported by substantial evidence and appellant merely asks this Court to substitute its judgment for that of the agency. This the Court has indicated it will not do. Pinellas Broadcasting Co. v. Federal Communications Commission, 97 U.S. App. D.C. 236, 230 F.2d 204 (1956), cert. denied 350 U.S. 1007 (1956).

The Commission's conclusion that intervenor sustained its burden of proof on the site availability issue is also challenged by appellant. In resolving that issue, the Commission followed well settled policy, and agreed with the Examiner's, instead of the Board's, evaluation of the record. Substantial evidence supports the Commission's conclusion that intervenor has reasonable assurance in good faith that its proposed site is available. Appellant argues, however, that the Commission should have insisted on more conclusive

proof that the proposed site was available. But the Commission's past experience has demonstrated that a binding legal agreement entered into at considerable expense to the applicant is not required. In any event, appellant's contentions are rendered moot by the fact that intervenor has obtained a lease for the proposed antenna site.

ARGUMENT

In this case both appellant, Christian Fundamental Church, and intervenor, Milam & Lansman, seek authority to operate an FM station in St. Louis on the same channel. After a comparative hearing the Commission's Review Board concluded that on balance a grant of intervenor's application would better serve the St. Louis public. The Commission also concluded on the basis of the hearing record that intervenor had a good faith reasonable assurance that its proposed site would be available.

We will show contrary to appellant's asseptions that the Commission exercised sound judgment in resolving the issues in this case. Its judgment is supported by substantial evidence and adequate findings; and there has been no unlawful departure from precedent.

I. THE COMMISSION CORRECTLY CONCLUDED THAT INTERVENOR HAS A GOOD FAITH REASONABLE ASSURANCE THAT ITS PROPOSED ANTENNA SITE IS AVAILABLE FOR USE. 4/

One of the issues explored at the hearing was whether intervenor's proposed site is available for use. This issue is designed to ascertain if an applicant has reasonable assurance in good faith that his site will be available. For many years the Commission permitted the filing of applications on a "site-to-be determined basis." Then in 1953 the rules were amended and radio applicants were required to specify a definite site. Antenna Systems; Showing Required, 18 Fed. Reg. 6968 (1953). At that time the

4/ On December 12, 1967, as this brief was being prepared, intervenor notified the Commission, pursuant to 47 CFR § 1.65, that it had in fact obtained a lease for its proposed site. As a practical matter, we believe that this renders moot appellant's argument that the site is not available. Nevertheless, as we demonstrate in the body of the argument, there is a substantial basis in the hearing record for the Commission's conclusion on this issue.

Commission recognized that the new rule might impose some hardship on small broadcast applicants with limited financial resources who would have to tie up large amounts of their capital in land. Accordingly, since that time, the Commission has consistently held that an applicant is not required to enter into a final binding arrangement in order to establish that a site is available, Greater New Castle Broadcasting Co., 8 Pike & Fischer, RR 291, 318 (1953); nor need he have legal control over the site, B. J. Parrish, 14 RR 480, 483 (1956), or absolute assurance that he will be able to use the site, Brennan Broadcasting Co., 15 RR 12e (1957). All that is required is reasonable assurance in good faith that the proposed site is available, Beacon Broadcasting System, Inc., 21 RR 727, 728 (1961); see also Chronicle Publishing Co., 4 RR 2d 579 (1965) affirmed 125 U.S. App. D.C. 53, 366 F.2d 632 (1966).

As set forth in more detail in our counterstatement (supra, pp. 5-7), a site availability issue in regard to intervenor's proposal was added in this case at the request of the Commission's Broadcast Bureau. After hearing on that issue, both the Bureau and the Hearing Examiner concluded that the matter should be resolved in intervenor's favor. In a split decision, the Review Board reversed.

As a result of its consideration of an application for review, the full Commission reversed the Board and in effect sustained the examiner's recommendation on the site question. In its Memorandum Opinion and Order, the Commission summarized the

evidence upon which the examiner had relied. It cited four leading cases (supra, p. 6-7) dealing with site availability questions and concluded, on review of the whole record, that intervenor had sustained its burden of proof.

Appellant now contends that the Commission did not fully explain its reasons for reversing the Board's decision. It is clear, we submit, that the Commission agreed with both the Bureau and the dissenting Board member who had maintained that a binding legal commitment was not required. Thus, it found sufficient the evidence submitted by intervenor on which the examiner had relied in resolving the issue. This evidence, inter alia, included a lease-option agreement signed by the rental agent; her testimony regarding her authority to enter into such agreements; and her representation that she has wide latitude to sign such agreements.

Appellant places principal reliance on cases like Retail Employees Union v. N.L.R.B., 123 U.S. App. D.C. 360, 360 F.2d 494 (1965). There the agency had reversed the examiner's finding on a credibility question without furnishing any explanation at all. Here the Commission agreed with the examiner in reversing the Board. It gave a concise statement of the reasons for its action. And this Court has held that the controlling statute requires no more than a "concise statement." National Broadcasting Co. v. F.C.C., 124 U.S. App. D.C. 116, 129, 362 F.2d 946, 959 (1966).

Appellant also contends that the Commission erred in not specifically ruling on several exceptions to evidentiary rulings made by the Examiner.^{5/} This contention is lacking in substance. First, the Board in its decision on the comparative aspects of the proceeding specifically ruled on those exceptions denying them in the light of the Commission's Memorandum Opinion and Order resolving the site availability issue in intervenor's favor (R. 745). Moreover, the Commission did not rule on the exceptions because appellant never asked it to do so. While appellant filed an application for review with the Commission (R. 1098-1119), it never raised this matter.

Albertson v. F.C.C., 100 U.S. App. D.C. 103, 243 F.2d 209 (1957), is squarely on point. There, as here, appellant contended that the Commission had failed specifically to rule on its exceptions. This Court refused to consider that contention because it was "satisfied that Albertson was bound to complain to the Commission concerning its alleged failure to rule specifically upon each of his exceptions to the Examiner's Initial Decision." It relied on 47 U.S.C. §405, which makes the filing of a petition for reconsideration a condition precedent to judicial review where appellant "relies on questions of fact or law upon which the Commission has been afforded no

^{5/} The examiner refused to admit the evidence appellant sought to introduce because it was outside the scope of the site availability issue as spelled out by the Review Board (R. 423 Tr. 572, 588-590). Thereafter, appellant never sought enlargement of the issues as it might have done under the Commission's rules of practice and procedure, 47 CFR §1.229 (1967 Supp.).

opportunity to pass." See also Abacoa Radio Corp. v. F.C.C., 123 U.S. App. D.C. 218, 358 F.2d 849 (1965); Community Broadcasting Service, Inc. v. F.C.C., ___ U.S. App. D.C. ___, 377 F.2d 143 (1967).

Underlying all of appellant's arguments on the site issue is the premise that the Commission, like the Board, should have demanded much more conclusive evidence that intervenor's proposed site was in fact available for use. But the Commission's experience has shown that the public interest is not necessarily served by requiring applicants to enter into binding legal arrangements because land is expensive whether rented or purchased, supra pp. 9-10. As a practical matter the Commission has continuing jurisdiction over this matter since before an applicant can construct at a different site than that specified in the application it must obtain Commission authorization, 47 CFR 1.533-8 (1967 Supp.).

II. THE COMMISSION JUDGMENT THAT A GRANT OF INTER-
VENOR'S APPLICATION WOULD BETTER SERVE THE ST.
LOUIS PUBLIC IS SUPPORTED BY ADEQUATE FINDINGS
AND SUBSTANTIAL EVIDENCE.

On the comparative aspects of the case, appellant argues that the Review Board's decision granting intervenor's application is defective because (1) it did not consider all relevant evidence; (2) it did not make basic findings of fact and (3) it departed from established Commission policy. We respectfully submit that a reading of the Board's decision reveals that these contentions are without merit (R. 732-747).

The Board's decision, which the Commission refused to review, adopts many of the examiner's basic findings of fact. Where the Board did not agree with his findings, it made additional findings of fact. The Board did not agree with the recommendation that appellant's application should be preferred on a comparative basis. It set forth in considerable detail its reasons for disagreeing (R. 732-747). Thus, there is no merit to appellant's contention that the Board did not adhere to the standards enunciated in Johnson Broadcasting Co. v. F.C.C., 85 U.S. App. D.C. 40, 175 F.2d 351 (1949).

Appellant's real complaint is with the judgment reached by the Board. However, this Court has indicated that it will not

substitute its judgment for that of the agency, especially in a comparative case. Pinellas Broadcasting Corp. v. F.C.C., 97 U.S. App. D.C. 236, 238, 230 F.2d 204, 206, cert. den. 350 U.S. 1007 (1956); Florida Gulfcoast Broadcasters, Inc. v. F.C.C., 122 U.S. App. D.C. 250, 352 F.2d 726 (1965).

Here, intervenor's application was preferred by the Board principally because one of the owners, Lansman, would devote his full time to the operation of the proposed station. Additionally, Lansman was found to have significant broadcast experience. His experience includes construction of one radio station, operation as the chief engineer of another radio station, and association with station KRAB, a non-commercial, listener-supported station. Mr. Lansman also holds a radiotelephone first-class operator license from the Commission, supra pp. 2-5.

On the other hand, appellant's principals are three busy ministers (R. 734). They propose to dedicate whatever time is necessary to the operation of the proposed station. They also indicate that they will retain an experienced broadcaster as general manager. In the past the Commission has awarded little credit for this type of ownership participation in the operation of a proposed station, Veterans Broadcasting Company, Inc., 38 F.C.C. 25, 50 (1965); see also Sunbeam Television Co., 38 F.C.C. 805, 810-811, affirmed sub nom. Community Broadcasting Corp. v. F.C.C., 124 U.S. App. D.C. 230, 363 F.2d 717 (1966), and part time participation by station owners has been accorded no weight

in the Commission's recent Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 395 (1965).

Pointing to the ministers' many church related activities (R. 734), the Board found that, despite their sincere intentions, they simply would not be able to participate fully in the operation of the station. They were also found to possess little broadcast experience (R. 738-739). Appellant was therefore awarded little credit in these areas.

On balance, the substantial credit received by intervenor for full-time participation of one of the owners in the day-to-day operation of the station coupled with his significant broadcast experience, was found to outweigh appellant's slight preferences for diversification of mass media and larger coverage (R. 738, 742).

Appellant argues that little credit should have been awarded intervenor because Mr. Lansman is only 22 years of age, did not work for a regular salary at the non-commercial station with which he was connected, and may well live at the proposed station ^{6/} (Br. p. 31). Although Mr. Lansman is 22 years old, he has obtained a radiotelephone first-class operator license from the Commission. He has passed a most difficult test administered by the Commission and has secured one of the most prized ^{7/} broadcast operator's licenses. We are aware of no reason why broadcast experience obtained in connection with a non-commercial,

^{6/} It is difficult to understand the relevance of this fact since the station will be located in St. Louis.

^{7/} First class radio operators are skilled radio engineers with special knowledge of radio equipment. Didriksen v. F.C.C., 103 U.S. App. D.C. 17, 19, 254 F.2d 354, 356 (1958); 47 CFR 13.1-94 (1967 Supp.).

listener-supported station is not meaningful, nor does appellant point to any. We see no relevance to the fact that Lansman proposes to live at the station. In fact, it might be argued that this might facilitate his supervision of the station's operation.

Several other related points are raised by appellant, including the fact that Station KRAB, with which intervenors are affiliated, "broadcasts no commercial spot announcements." All of these matters were explored at the hearing, in the initial decision, and in the Board's final decision. They were found to be of no decisional significance. Appellant merely asks this Court to substitute its judgment for that of the agency, something which this Court has refused to do in the past, because making a comparative choice "is basically a matter of judgment, often difficult and delicate, entrusted by Congress to the administrative agency." Pinellas Broadcasting Corp. v. F.C.C., 97 U.S. App. D.C. at 238, 230 F.2d at 206; Florida Gulfcoast Broadcasters, Inc. v. F.C.C., supra; Community Broadcasting Service, Inc. v. F.C.C., supra.

CONCLUSION

In view of the above, the Commission's orders should be affirmed.

Respectfully submitted,

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December 22, 1967

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REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED JAN 15 1968

No. 21,123

Nathan J. Paulson
CLERK

CHRISTIAN FUNDAMENTAL CHURCH,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

LORENZO W. MILAM & JEREMY D.
LANSMAN, A Partnership,

Intervenors.

On Appeal from Orders of the
Federal Communications Commission

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FEDERAL COMMUNICATIONS
COMMISSION,

Appellee,

LORENZO W. MILAM & JEREMY D.
LANSMAN, A Partnership,

Intervenors.

No. 21,123

CERTIFICATE OF SERVICE


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APPELLANT in the above entitled case, on
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,123

CHRISTIAN FUNDAMENTAL CHURCH,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

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LANSMAN, A Partnership,

Intervenors.

On Appeal from Orders of the
Federal Communications Commission

REPLY BRIEF FOR APPELLANT

COUNTERSTATEMENT OF THE CASE

Appellee's Counterstatement, which Intervenors adopt *in toto*, contains an important error of fact as well as misleading and argumentative matters.

In the Counterstatement, and in the Argument of both Appellee and Intervenor, it is alleged that the Channel upon which the Appellant and Intervenor propose to operate is a Class B FM broadcast channel. The Commission, also, made such a "finding" [R. 736]. In fact, however, since the location of the proposed station is in the State of Missouri (in Zone II, as classified by the Commission) and since the frequency applied for is 102.5 mc/s [R. 732], the station proposed by Appellant and Intervenor is a Class C FM station [Section 73.205 and Section 73.206(b) of the Commission's Rules and Regulations (47 C.F.R. §73.205 and 73.206(b) (See Appendix)]. This Commission error respecting the Channel involved herein is important and takes on decisional significance respecting the coverage proposed by Appellant and Intervenor [See *Agreement, infra*].

At page 2, Appellee states that Appellant's principals minister to some 1,000 persons at their church. This is misleading. The church membership is approximately 200. The number of persons during a given week who attend church services is approximately 1,000 [R. 513]. Also, Appellee alleges that Appellant operates "three Church schools". This is inaccurate. The schools are private schools and are run independently of the Church. There are represented within the student body a total of 12 different religious denominations. The total enrollment of all three schools is approximately 250 [R. 513]. Again, Appellee alleges that it is the intention of the Appellant to hire a general manager. This is incorrect. Joseph Autenrieth, one of the principals of Appellant, will be the general manager; an assistant to the general manager will be hired [R. 734].

ARGUMENT

I. The Site IssueA. The Legal Inadequacy of the Commission's Decision on the Site Issue.

In its Brief, Appellant contends that the Commission's decision on the site issue was legally inadequate for (1) the Commission failed to give the basis for its decision and (2) failed to give the basis for rejection of the Board's decision which disqualified Intervenor. Neither Appellee nor Intervenor comes to grips with either of these arguments.

Appellee, at page 11 of its Brief, claims that the Commission, in reversing the Board "in effect sustained the Examiner's recommendation on the site question" and that in its Memorandum Opinion and Order resolving the site issue favorably for Intervenor, the Commission "summarized the evidence upon which the Examiner had relied". Appellee neglects to point out, however, that *the Commission did not state* that it was relying upon the reasons given by the Hearing Examiner, or those of the dissenting member of the Review Board, or for the reasons advanced by the Commission's Broadcast Bureau (which, of course, is not a decision-making authority). This Court is entitled to *a statement by the Commission of the reasons for its decision* and, if the reasons for its decision are those advanced by a delegated authority (which both Appellee and Intervenor argue), then the Commission (and not its General Counsel on appeal, and not counsel for a party to the appeal (Intervenor)) must state that its reasons are those advanced by one of its delegated authorities [*Burlington Truck Lines, Inc. v. U. S.*, 371 U. S. 156 (1962)]. But here the Commission did not do so. It did not adopt, refer to, mention or even imply that it was relying upon reasons advanced by the Hearing Examiner, the dissenting member of the Review

Board or anyone else. Therefore, the legal adequacy of the decision must stand or fall on its own. Appellant submits that it must fall.

Appellee states that the Commission's reasons for rejecting its Review Board's decision finding Intervenor's disqualified on the site issue were those advanced by the Commission's Broadcast Bureau and the dissenting Board Member of the Review Board. Appellee claims that "it is clear" that the Commission did this. Appellant submits that such is pure speculation by counsel for Appellee and is neither clear nor reasonable. This Court is entitled to a pronouncement by the Commission, not counsel for Appellee and not counsel for Intervenor's, as to the basis for rejection of the Review Board's detailed and proper analysis of the evidence respecting the site availability issue [*Burlington Truck Lines, Inc. v. United States, supra*].

Intervenor's appear to take a slightly different approach than the Broadcast Bureau. In an attempt to justify the extremely short and inadequate order of the Commission reversing the Review Board, they suggest that the Commission, by its Order, was merely correcting a legal error on the part of the Review Board, which according to Intervenor's, had departed from long-standing precedent and had radically departed from precedent without setting forth any reasons. This argument is imaginative, but not reasonable. Moreover, if in fact that had been the theory of the Commission's decision, it would have been extremely simple for the Commission to make such a statement (and explain its reasons for rejecting the reasons advanced by the Review Board); however, it did not do so. This speculation by Intervenor's cannot be accepted for the same reasons that the arguments of Appellee must be rejected; *supra*.

In its Brief, in support of its argument that the Commission's decision on the site issue is legally inadequate, Appellant cited numerous cases, including *Retail Store Employees Union v. N.L.R.B.*, 123

U. S. App. D. C. 360, 360 F.2d 494 (1965); *Oil, Chemical and Atomic Workers International Union v. N.L.R.B.*, 124 U. S. App. D. C. 113, 362 F.2d 943; *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 516. Intervenor's do not attempt to distinguish any of these cases. Appellee referred to one, *Retail Store Employees Union, supra*. It states that whereas in *Retail*, the agency reversed an Examiner's finding without furnishing any explanation at all, that in this case the Commission agreed with the Examiner in reversing the Board. Of course, the answer to this is that the Commission did not say that it agreed with its Examiner, and, of course, even if it did, it nevertheless would have had to *explain its reasons for rejecting* the detailed findings, ultimate findings and conclusions of its Review Board. Stated simply, neither Appellee nor Intervenor's has distinguished the cases relied upon by Appellant and neither justified the grossly defective decision of the Commission on the site issue; for these reasons alone, the case must be remanded.

B. Appellee and Intervenor's Misstate the Scope of the Site Issue.

In order to attempt to justify the Commission's decision on the site issue, Appellee and Intervenor's are "forced" into severely limiting the scope of the site issue.

When the Commission's Review Board enlarged the issues in this proceeding to include a site availability issue it made it crystal clear the scope of that issue. The Board stated [R. 651]:

"Because of the extensive alterations which Milam and Lansman [Intervenor's] propose to make on the roof, together with the fact that approval of the plans is a prerequisite to the use of the roof and since it is not clear that the roof of the Continental Building is available to Milam and Lansman, Milam and Lansman have not demonstrated

satisfactorily that there is reasonable assurance of the *approval of said construction* and an issue will therefore be added . . ." (Emphasis added).

Similarly crystal clear was the Review Board's reasons for concluding that Milam-Lansman failed to meet their burden on the site issue, *to wit*:

" . . . Milam-Lansman's antenna proposal stands precisely as it did when the Board added the site issue. At that time (a) it appeared that extensive alterations were required on the roof in connection with either (1) dismantling of an existing tower and the erection and the guying of a new one or (2) a 60-foot addition with guying to the existing tower; (b) authority to affect the required alterations had not been secured and (c) such authority could not be granted by the building's rental agent (Miss Tucker)" [R. 654].

Both Appellee and Intervenor carefully avoid any mention of construction; neither refers to the fact that Intervenor propose to mount their antenna on a 116-foot tower (or equivalent to a 10-story building) and, at present, such structure does not exist atop of the Continental Building; and neither mentions the fact that *Appellant's antenna* is to be mounted on the Continental Building on an *existing structure* requiring no construction, and neither mentions the fact that the coverage proposed by Intervenor is greater; assuming that the 116-foot tower can be constructed, then would be the case if Intervenor were unable to construct such a tower, for in FM and TV broadcasting decreased height results in decreased coverage.

In attempting to support the Commission's reversal of its Review Board, both Appellee and Intervenor stress, on numerous occasions that no binding agreement is necessary to establish site availability. Moreover, Commission decisions are set forth in support of this principle. Appellant agrees, and so does the Review Board, who expressly found in its decision disqualifying Intervenor that a binding agreement

is not necessary to show site availability [R. 651]. However, some assurance — reasonable assurance — is necessary and all agree on this, also. On this record there is no assurance, let alone reasonable assurance, however, that any construction may be affected atop the Continental Building.

Apparently, in an attempt to direct attention away from the obvious failure by Intervenor to give any assurance of the required construction atop the roof of the Continental Building, both Intervenor and Appellee state that Intervenor has entered into a lease for the rooftop of that building. First, mention of such an "agreement" is entirely improper, for such an instrument is not part of this record. Second, Appellant does not concede the validity of that lease. Third, the terms of that lease are not set forth. If it is as vague an instrument as the lease-option agreement (which Appellant claims it is), it authorizes *no construction* atop the Continental Building.

Also, apparently in an attempt to confuse the record, Intervenor argues that the Review Board, in disqualifying Intervenor for failure to meet its burden under the site issue, did so by discussing suitability rather than availability. The simple answer to this question is that the Review Board acknowledged in its decision disqualifying Intervenor that suitability was not an issue; it specifically concluded that failure by Intervenor to establish reasonable assurance that it could construct its proposed antenna system atop the Continental Building was not a question of suitability but one of availability [R. 654, footnote 9]. The case cited by Intervenor in this regard, *Edina Corporation*, 24 Pike & Fischer RR 455, is not in point and, indeed, supports the opinion of the Commission's Review Board. In *Edina*, the availability of the proposed site was placed in issue in view of the fact that the City Council of a community had not yet had an opportunity to act on the applicant's request for a *conditional use permit* which would permit construction of

a radio tower at the site proposed. In that case a request for a suitability of the site was requested also, but was denied. It was alleged that the land involved was swampy and unsuitable for the location of the tower. Since such an allegation was not supported by substantial evidence, the Review Board found it to be speculative and refused to place the suitability of the site in issue. In this case, like *Edina*, there had to be approval before the site could be *used* in the manner proposed by the applicant.

Appellant does not concur with Board Member Nelson's statement of what constitutes availability and what constitutes suitability respecting a proposed antenna site; and neither did the majority of the Review Board.

As to availability and suitability, one might enter a lease for a house which then is available to him for use, but that does not entitle him to construct an additional story above the present roof even though the house might be suitable for such additional construction. The house does not become available for such construction until authority is received from the owner to undertake the specific construction proposed.

In the final analysis Intervenor has proposed a facility to serve a definite area and population which cannot be achieved without additional construction atop the Continental Building. If the Court affirms the Commission, there is no way thereafter for Appellant to challenge a request by Intervenor to lower its antenna height and Intervenor will have outsharped Appellant and will provide service to a lesser area and population. Being a Class C FM channel — the most powerful authorized by the Commission (with a maximum permissible power of 100,000 watts and an antenna height of 2,000 feet) (Rule 73.206(b)) — wide area coverage is expected. A grant to Intervenor will not achieve that result nearly so much as will a grant to Appellant.

C. Restriction of Cross-Examination by Appellant

Appellee contends that the Board, in its decision on the comparative aspects of the proceeding, specifically ruled on Appellant's Exceptions respecting the Examiner's restrictions of the testimony on the site issue. However, as admitted by Appellee, the Review Board's ruling denying those Exceptions was that they were denied "in view of the Commission's Memorandum Opinion and Order" resolving the site issue in favor of Intervenor [R. 745]. But as established, *supra*, that Memorandum Opinion and Order gives no reasons, whatever, for (1) its decision; or (2) the reasons for reversing its Review Board. How then can it be said that that Order gave reasons for upholding the Examiner's rulings referred to above? Also, contrary to Appellee, Appellant did, in its Application for Review, request that the Commission again consider the site issue and, in support of its request referred not only to the reasons set forth by the Review Board and advanced by it, but to its Exceptions, also [R. 1118-20]. Therefore, this matter is not raised here for the first time and this Court's holdings in *Albertson v. F.C.C.*, 100 U. S. App. D. C. 103, 243 F.2d 209, and *Abacoa Radio Corp. v. F.C.C.*, 123 U. S. App. D. C. 218, 358 F.2d 849, are inapplicable here.

II. The Comparative Issue

Both Appellee and Intervenor allege that the thrust of Appellant's argument respecting the Commission's handling of the comparative issue is that this Court substitute its judgment for that of the Commission. Such simply is not the case. In its Brief, Appellant did not request this Court to judge the facts in this case, but rather to review the Commission decisions to determine compliance with the law, and in particular, compliance with the requirements imposed by this Court in *Johnson Broadcasting Co. v. F.C.C.*, 85 U. S. App. D. C. 40, 175 F.2d 351. Appellant, in its

Brief, argues that (1) the Commission failed to consider important adverse facts respecting Intervenor; (2) that certain of the Commission's ultimate findings of fact are irrational inferences of proper findings of the basic fact; and (3) that the Commission's ultimate decision was contrary to the Commission Policies and contrary to Court and Commission precedent. Appellee and Intervenor have failed to refute these alleged errors.

A. Failure to Recognize Adverse Evidence Respecting
Intervenors.

In its Brief, Appellant points to record evidence such as the immaturity of Intervenors' Mr. Lansman, his limited broadcast experience, (and most of this as a teen-ager); his unfamiliarity with the community of St. Louis and his unconventional "employment" at Station KRAB.

In their Brief, Intervenors fail to make any comment whatever respecting the Commission's failure to acknowledge, consider and weigh these deficiencies. Appellee's only comment appears at pages 17 and 18 of its Brief. Respecting Mr. Lansman's youth, Appellee points out that he is a licensed radio engineer. True, but does this make him more mature, or enhance his managerial qualifications? Certainly not. One may obtain such a license without a high school education. It is common knowledge in the industry that some who hold such a license, nevertheless, are unable to maintain correctly broadcast equipment. Appellee claims it is aware of no reason why broadcast experience gained with a non-commercial listener supported station is not meaningful. But Mr. Lansman proposes to be general manager of a *commercial* station which, of course, would require supervision of the sales efforts at the station, implementation of policy with respect thereto, and perhaps engagement in sales by Mr. Lansman in view of a very small staff (four fulltime and one part-time, including Mr. Lansman) proposed by Intervenors. As

stated by Appellant in its Brief, the *Johnson* case, *supra*, requires the Commission to consider evidence pro and con and the Commission's failure to consider the adverse evidence respecting Mr. Lansman's qualifications to be manager of a commercial station in a large metropolitan city constituted reversible error.

B. Ultimate Findings of the Commission not Rational Inferences of Proper Findings of Basic Fact.

Both appellee and intervenors allege that the Commission's preference to intervenors respecting integration of ownership and management was a correct ultimate finding based upon proper findings of basic fact and that its conclusion that the preference to intervenors in this category outweighed the other preferences awarded Appellant was consistent with Commission precedent and within the discretionary powers of the Commission.

As pointed out by Appellant in its Brief, however, in directing itself in the integration proposal of Appellant and intervenors, the Commission failed to consider adverse findings respecting the integration proposal of intervenors, and in particular, its principal, Mr. Lansman, and erred, also, in finding ultimately that Appellant's principals will devote an insignificant amount of time to the operation of the station. Appellant need not repeat those arguments here. Comment is appropriate, however, respecting the cases cited by appellee and intervenors. Respecting the category of integration of ownership and management, appellee, in support of the Commission's decision cites *Veterans Broadcasting Company, Inc.*, 38 F.C.C. 25, 50, 4 Pike & Fischer RR 2d 375, and *Sunbeam Television Co.*, 38 F.C.C. 805, 810-811, 5 Pike & Fischer RR 2d 85, 90, 91. Intervenor cites *Veterans Broadcasting Company, Inc.*, also, and, additionally, *Charles Vanda*, 8 Pike & Fischer RR 2d 427. In *Veterans* there was involved mutually exclusive applications

for a new television station. In that case, the Commission did *not* prefer the applicant, who proposed substantial participation in the operation of the station, where the controlling stockholder of that applicant had been in retirement for 13 years and who, as a licensee of an AM station, had delegated authority to a hired general manager and kept up with the operation of the station by reports from a manager rather than from "on the scene" supervision. Rather, preference respecting integration of ownership and management was given to an applicant who engaged an outsider to be general manager of the station, where the past activities of the applicant's principals and the length of their association in joint efforts gave assurance that they would not be content with spectator's roles in station affairs but would maintain a firm grip on the operation reins of the station. Appellant, in this proceeding, makes a stronger showing than the preferred applicant in *Veterans*, for whereas a general manager was to be hired in *Veterans*, here one of Appellant's principals will be general manager, all three principals have had a long association in St. Louis, and have engaged in joint efforts to serve the religious and educational needs of the area residents. In *Sunbeam, supra*, there was involved a comparative hearing between the licensee of a television station, which had applied for a renewal of license, and another applicant who had filed "on top of" the renewal application. The Commission preferred the licensee of the existing station. It awarded a moderate preference in the category of integration of ownership and management to the licensee wherein 51% ownership was fully integrated into the operation of the station, as opposed to the other applicant where only an 8% ownership interest would be involved in the operation of the proposed station fulltime. In that case, the Commission held insignificant the fact that both applicants had stockholders who would devote from 2 to 10 hours per week to the operation of the station in minor roles. Here, all three principals of Appellant will hold positions of responsibility requiring their day-to-day

attention to the station and which will require also that each devote a substantial amount of time to the station on a daily basis. As was found by the Hearing Examiner herein, they will be completely integrated into the operation of the station. In *Charles Vanda, supra*, the television applicant preferred was 100% integrated. The losing applicant proposed to be the manager of an AM and an FM station in a community different from the community for the television facility being applied for. Correctly, the Review Board held that he could not possibly devote fulltime at all three stations and that he would have to divide his time among the three which would be *at different locations*. Here the principles of Appellant will be engaged in no activity away from the site of the studios of the proposed station (which will be located at the site of the Church and Schools of Appellant). Accordingly, unlike the situation in *Charles Vanda*, appellant principles will be on the scene at all times to operate the station.

Respecting program planning, the finding of the Commission that neither applicant is entitled to a preference ignores the basic evidence to the effect that whereas Appellant made adequate programming investigations, Intervenor's did not, and, therefore, under the Commission's *Policy Statement on Comparative Broadcast Hearings*, 5 Pike & Fischer RR 2d 1901 (at page 1911), Intervenor's should have been assessed a serious deficiency.

As to the past broadcast record at Station KRAB, Intervenor's continue to maintain that such a record is excellent. It points to evidence it claims supports that conclusion. It has been Appellant's position throughout this proceeding that the record of Station KRAB is poor; Appellant has pointed to record evidence to support this allegation. The Commission in its decision, concludes that the broadcast record of KRAB is not poor. However, it gives no reasons in support of that conclusion.

It sets forth no facts, favorable or unfavorable. Both Appellant and Intervenor have considered the broadcast record of KRAB important and of decisional significance. Abundant evidence was received respecting the operation of that station. The Commission, therefore, was obliged to examine such evidence, make basic and ultimate findings with respect thereto, as well as an ultimate conclusion. Failure to do so was error. (*Johnson Broadcasting Co. v. F.C.C., supra*).

The Commission, in giving Appellant only a slight preference respecting coverage pointed out, as does Appellee and Intervenor, that since a Class B FM station is designed to serve a sizeable community, city or town or . . . the principal city or cities of an urbanized area and the surrounding area and, since both Appellant and Intervenor accomplish this, the area to be served by Appellant, and not Intervenor (which lies approximately 30 miles distant from St. Louis in another state) is of little significance. Considering the fact that Appellant will serve approximately 23,000 persons who will not be served by Intervenor, but who will receive a 3rd primary FM service if Appellant is granted, such a conclusion is illogical, even assuming that a Class B station were being applied for. However, the Commission's decision becomes even more illogical and erroneous when it is considered that a *Class C station is involved* here and a Class C station is designed to render service to a community, city or town and *large surrounding areas*. The fact, therefore, that the area to be served by Appellant, which will not be served by Intervenor, is approximately 30 miles distant and in a different state does not, in any way, detract from the obvious superiority in the efficiency of Appellant's proposal for, by definition, service to a large area is contemplated by the Class C Channel being applied for. Accordingly, the Commission, in awarding only a very slight preference to Appellant respecting coverage, not only relied upon a serious error of fact as to the class of station being applied for, but constituted, also,

an irrational conclusion based upon improper findings of fact. With the correct substantial preference being awarded Appellant, such additional weight might have resulted in a different ultimate conclusion. At any rate, the case must be remanded to the Commission respecting the coverage question.

Respecting the question of diversification of control of mass media, neither Appellee nor Intervenor acknowledge the fact that one of Intervenor's principals (Mr. Milam) has an interest in Station KBOO (an educational FM station, at Portland, Oregon, which was granted June 14, 1967, and which is listed in the official files of the Federal Communications Commission). Accordingly, there are two stations in which Intervenor has an interest and the proposed FM station at St. Louis would make the third. Moreover, the Commission is concerned with *maximum* diversification of broadcast media and it can achieve maximum diversification in this proceeding only by a grant to Appellant.

C. Ultimate Commission Decision Contrary to Court
and Commission Precedent and Policy.

Intervenors and Appellee argue that the Commission's decision respecting the comparative case is supported by substantial evidence of record, the record on the whole, and is consistent with Commission and Court precedent in comparative hearings before the Commission. This being so, it argues that the decision is within the discretion of the Commission and that this Court should not substitute its judgment for the judgment of the Commission. It argues, therefore, that the Commission's decision on the comparative issue must be affirmed.

In its Brief, Appellant did not request this Court to substitute its judgment for that of the Commission's, nor did it deny that the Commission had wide discretion in evaluating and weighing evidence in comparative proceedings before the Commission.

Appellant did point out, however, and Intervenor and Appellee have failed to refute, that the Commission failed to consider evidence as required by law. Most notable is the question of proposed programming. In this proceeding there was a specific issue inquiring into the proposed programming of Appellant and Intervenor [R. 509]. Appellant and Intervenor each offered substantial evidence respecting their proposed programming. The Review Board found that the proposals of Appellant and Intervenor were markedly different. However, despite this the Review Board went on to say that it concluded that since neither applicant has established a superior devotion to public service, no comparative preference or demerit would be accorded respecting proposed programming. This Court is entitled to a much greater explanation for not awarding a preference or deficiency. In *Johnson Broadcasting Co. v. F.C.C.*, *supra*, this Court held that one of the essentials in comparative decisions before the Federal Communications Commission is that the Commission set forth findings respecting *every difference* excepting those which are frivolous and wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. Certainly, proposed programming is neither frivolous nor unsubstantial. Indeed, in its Brief, Intervenor continues to stress and argue the merits of their proposed programming. Having found the programming markedly different, the Review Board was obliged to make findings on the comparative element of proposed programming.

One matter remains. Intervenor's allegations that Appellant proposes a private adjunct for its religious activities is false and simply has no support on the record. The proposed station will be neither a

part of the Church of Appellant nor a part of Appellant's school [R. 307-08]. Appellant will not engage in racial discrimination as Intervenor suggests. Such a charge represents only a desperate attempt to confuse this record. Appellant's church has never practiced racial segregation and members of the Negro race quite regularly worship at the church [Tr. 538]. There is no evidence of record that past policy of the private school of Appellant was in violation of any city, county, state, or national law or policy, and many, many other schools, in the past, were segregated. At any rate, the school is not now racially segregated. Within the student body are 12 different religious denominations (Tr. 323-4). Respecting Intervenor's hypothetical program by Martin Luther King, a fair reading of the testimony is that the St. Louis station of Appellant would not carry a regularly scheduled program by Mr. King if it was designed primarily to raise funds to support the activities of CORE in the State of Mississippi but that the station would consider an occasional program of that nature.

By failing to reply to each and every argument advanced by Appellee and Intervenor, Appellant in no way concedes the validity of such argument.

For all of the reasons advanced in Appellant's Brief in chief and this Reply Brief, it is respectfully submitted that this case should be reversed and remanded to the Commission.

Respectfully submitted,

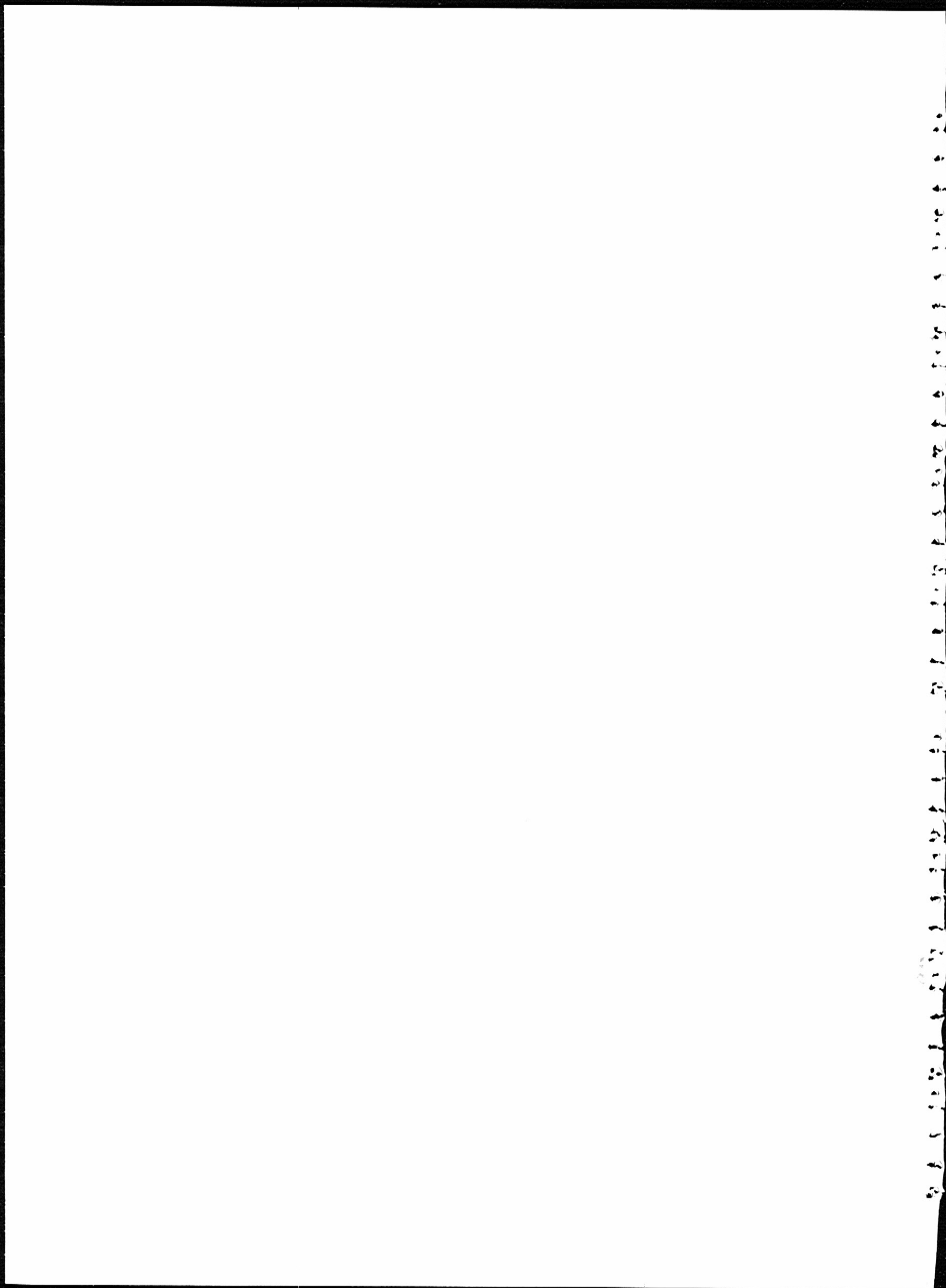
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APPENDIX

Rules of the Federal Communications Commission

§73.205 Zones. - For the purpose of allocation and assignment, the United States is divided into three zones as follows:

(a) Zone I consists of that portion of the United States located within the confines of the following lines drawn on the United States Albers Equal Area Projection Map (based on standard parallels $29-1/2^{\circ}$ and $45-1/2^{\circ}$; North American datum): Beginning at the most easterly point on the State boundary line between North Carolina and Virginia; thence in a straight line to a point on the Virginia, West Virginia boundary line located at North Latitude $37^{\circ} 49'$ and West Longitude $80^{\circ} 12' 30''$; thence westerly along the southern boundary lines of the States of West Virginia, Ohio, Indiana, and Illinois to a point at the junction of the Illinois, Kentucky, and Missouri State boundary lines; thence northerly along the western boundary line of the State of Illinois to a point at the junction of the Illinois, Iowa, and Wisconsin State boundary lines; thence easterly along the northern State boundary line of Illinois to the 90th meridian; thence north along this meridian to the 43.5° parallel; thence east along this parallel to the United States-Canada border; thence southerly and following that border until it again intersects the 43.5° parallel; thence east along this parallel to the 71st meridian; thence in a straight line to the intersection of the 69th meridian and the 45th parallel; thence east along the 45th parallel to the Atlantic Ocean. When any of the above lines pass through a city, the city shall be considered to be located in Zone I. (See Figure 1 of §73.699.)

(b) Zone I-A consists of Puerto Rico, the Virgin Islands and that portion of the State of California which is located south of the 40th parallel.

(c) Zone II consists of Alaska, Hawaii, and the rest of the United States which is not located in either Zone I or Zone I-A.

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§73.206 Classes of commercial channels, and stations operating thereon. —

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(b) Class B-C channels and Class B and Class C stations.

(1) Except for the channels specified in paragraph (a)(1) of this section all of the channels listed in §73.201 from 222 through 300 (92.3 through 107.9 Mc/s) are classified as Class B-C channels, and (subject to the restrictions set forth in §73.204) are assigned for use in Zones I and I-A by Class B stations only, and for use in Zone II by Class C stations only (there are no Class C stations in Zones I or I-A and no Class B stations in Zone II).

(2) A Class B station is a station which operates on a Class B-C channel in Zone I or Zone I-A, and is designed to render service to a sizeable community, city, or town, or to the principal city or cities of an urbanized area, and to the surrounding area.

(3) With respect to Class B stations authorized after September 10, 1962, no such station will be authorized with effective radiated power greater than 50 kilowatts (17 dbk), and the coverage of a Class B station authorized after that date shall not exceed that obtained from 50 kilowatts effective radiated power and 500 feet antenna height above average terrain. For provisions concerning minimum power, and concerning reduction in power where antenna height above average terrain exceeds 500 feet, see §73.211.

(4) A Class C station is a station which operates on a Class B-C channel in Zone II, and is designed to render service to a community, city, or town, and large surrounding area.

(5) With respect to Class C stations authorized after September 10, 1962, no such station will be authorized with effective radiated power greater than 100 kilowatts (20 dbk), and the coverage of a Class C station authorized after that date shall

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not exceed that obtained from 100 kilowatts effective radiated power and antenna height above average terrain of 2,000 feet. For provisions concerning minimum power, and reduction in power where antenna height above average terrain exceeds 2,000 feet, see §73.211.